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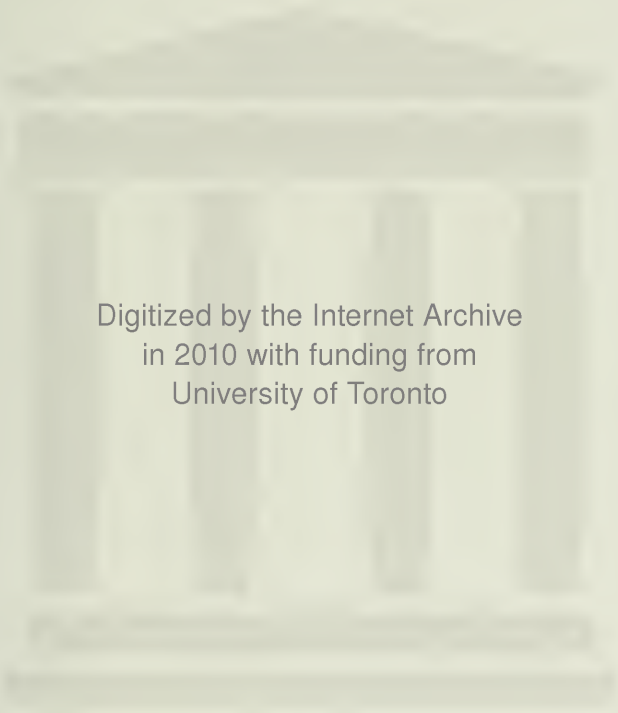
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THE  
H I S T O R Y  
OF THE  
C A S E S  
OF  
CONTROVERTED ELECTIONS.  
VOL. IV.



35675  
11 74593

THE  
H I S T O R Y  
OF THE  
C A S E S  
OF  
CONTROVERTED ELECTIONS,

WHICH WERE

Tried and determined during the First and  
Second Sessions of the Fourteenth Parlia-  
ment of Great Britain.

XV. and XVI. Geo. III.

By SYLVESTER DOUGLAS, Esq. of Lincoln's Inn,  
Barrister at Law.

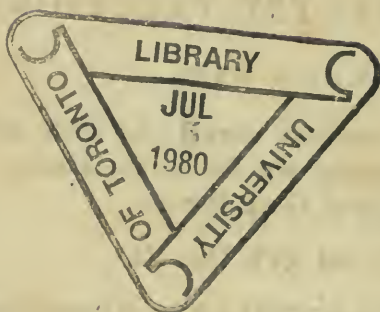
Quod neque inflecti gratiâ, neque perfringi potentiâ,  
neque adulterari pecuniâ possit. Cic.

VOL. IV.

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L O N D O N:  
PRINTED FOR T. CADELL, IN THE STRAND.  
MDCCLXXVII.

11 74593



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*brief*

*LA*

*0055408*

*Vol 4*





## ERRATA in VOL. IV.

- Page 13, line 5, for "*Colon*" read "*Colonel*."
- 86, 7, from the bottom, in the list of the Southampton Committee, for "*Members*" read "*Member*."
- 91, 11, for "*officers*" read "*officer*."
- 93, 2, for "*elegibility*" read "*eligibility*."
- 98, 7, from the bottom, for "*inelegibility*" read "*ineligibility*."
- 101, 8, for "*49*" read "*46*."
- Ibid.* in the note at the bottom for "*Sir G. Covert*" read "*Sir W. Covert*."
- 103, 6, for "*Long*" read "*Longe*."
- Ibid.* In the same line, for "*Fletcher*" read "*Hatcher*."
- 106, At the end of note (2) at the bottom, insert "*(G.)*"
- 111, 6, for "*(2)*" read "*(1)*."
- 150, 9, for "*Sheriffs*" read "*bailiffs*."
- 159, 11, from the bottom for "*iu*" read "*in*."
- 162, 17, for "*Rapine*" read "*Rapin*."
- 170, 6, for "*contesfed*" read "*contended*."
- 184, 10, for "*watsett*" read "*wadset*."
- 244, 9, from the bottom, for "*1769*" read "*1469*."
- 292, 8, for "*marks*" read "*merks*."
- 352, 3 & 4, from the bottom, for "*of the House in the votes*" read "*in the votes of the House*."
- 360, The first note at the bottom should be marked "*(1)*" instead of "*(2)*."
- Ibid.* In note (1) for "*page 27*" read "*page 279*."
- 368, line 6, from the bottom, after "*he is*" insert "*by § 7*."
- 572, 1, from the bottom, for "*iben*" read "*iban*."

THE HISTORY OF THE

REIGN OF KING CHARLES THE FIRST

BY SAMUEL JOHNSON

IN TEN VOLUMES

LONDON: Printed by A. MILLAR, in Pall-mall, 1742.

Vol. I.

CHAP. I.

THE REIGN OF KING CHARLES THE FIRST

1625.

THE REIGN OF KING CHARLES THE FIRST

XXXII.

THE SECOND

C A S E

Of the BOROUGH of

C R I C K L A D E,

In the County of WILTS.

VOL. IV. . B

The day appointed for choosing the Committee was Tuesday the 6th of February, but, an hundred members not being present, the House adjourned till the day following.

On Wednesday, the 7th of February, the Committee was chosen, and consisted of the following Gentlemen :

Sir Tho. Clavering, Bart.

Chairman,

Sir George Robinson, Bart.

Walter Stanhope, Esq;

Viscount Middleton,

Edward Roe Yeo, Esq;

Sir Michael Le Fleming, Bart.

William Hervey, Esq;

William Lygon, Esq;

Daniel Lascelles, Esq;

John Frederick, Esq;

Sir Philip Hales, Bart.

William Chaytor, Esq;

Charles Goring, Esq;

N O M I N E E S.

*Of the Petitioners,*

William Adam, Esq;

*Of the Sitting Member,*

George Johnstone, Esq;

Members for  
Durham County.  
Northampton.  
Carlisle.  
Whitchurch.  
Coventry.  
Westmoreland.  
Essex.  
Worcestershire.  
Northallerton.  
Newport, Cornwall  
Downton.  
Penryn.  
Shoreham.  
  
Gatton.  
  
Appleby.

P E T I T I O N E R S,

Six Persons, on behalf of themselves and others, Electors of the Borough of Cricklade.

Fourteen Persons, on behalf of themselves, and others, Electors of the said Borough.

*Sitting Member.*

Samuel Peach, Esquire.

C O U N S E L.

*For the Six Petitioners.*

Mr. Mansfield, Mr. Graham.

C O U N S E L

*For the Fourteen Petitioners.*

Mr. Darrel.

C O U N S E L

*For the Sitting Member.*

Mr. Bearcroft, Mr. Lee,

## THE SECOND

## C A S E

Of the BOROUGH of

## C R I C K L A D E.

**A**FTER the election to supply the vacancy for this borough, occasioned by the death of Mr. Earle, had been declared void, on the trial of the cause during the last session of Parliament (1), a new election took place, on the 28th of February, 1775, and the four following days. Samuel Peach, Esq; John Dewar, Esq; and Samuel Petrie, Esq; were candidates. Mr. Peach was returned; and three petitions were pre-

(1) *Supra*, vol. i. p. 314.

presented to the House, complaining that he was unduly elected and returned; *viz.* one of Mr. Dewar, and two of two different sets of voters, in the borough.

The session was over before the trial of these petitions came on; but, at the beginning of this session, within the time limited for that purpose, the same persons renewed their petitions (1). The day appointed for taking them into consideration was Friday, the 2d of February, which was afterwards altered to Tuesday, the 6th of that month (2), and the House not being complete on that day, the ballot took place on Wednesday, the 7th of February.

On the 7th of February, when the parties and their agents were called in, nobody appeared on the part of Mr. Dewar. It was suggested, that he was gone abroad, and that his father was desirous that his petition should be with-

(1) Votes, 31 Oct. 1775, p. 34, 35, 36.

(2) *Ibid.* 1 Feb. 1776. p. 225.

drawn ; but *he* did not produce any authority from his son, to make an application for that purpose to the House. If he had, the same difficulty would have arisen here, which soon after happened in the second case of Ivelchester (1). When *several* petitions are presented, complaining of the *same* election or return, a *several* and distinct order is made concerning *each*, appointing the same day for taking each of them into consideration ; but, when it is found convenient to alter the day first fixed to a subsequent one, the form is, first to discharge the *several* orders before made, and then to make a *joint* order for taking all the petitions into consideration on such subsequent day. This was done on the first of February, with regard to the three petitions in question. The form will be best understood, by inserting the words of the votes.

1 February, 1776. “ The House was  
“ moved, that the several orders made

(1) *Vide infra.*



“ upon the 31st day of October last, for  
 “ taking into consideration, to-morrow,  
 “ the petition of John Dewar, Esq; and  
 “ also the petition of the several persons  
 “ whose names are thereunto subscribed,  
 “ in behalf of themselves and others the  
 “ electors of the borough of Cricklade, in  
 “ the county of Wilts; and also, the  
 “ petition of the subscribers, electors of  
 “ the borough of Cricklade, in the county  
 “ of Wilts, in behalf of themselves and  
 “ others, electors of the said borough,  
 “ severally complaining of an undue elec-  
 “ tion and return for the said borough,  
 “ might be read, and the said orders being  
 “ read accordingly,”

Ordered, “ That the said orders be dis-  
 “ charged.”

Ordered, “ That the said petitions be  
 “ taken into consideration upon Tuesday  
 “ next, at three of the clock in the after-  
 “ noon (1).”

(1) Votes, p. 225.

This



This last was the order of the day on Wednesday, the 7th of February, and, according to the statute (1), was read. It extended to all the three petitions; but, as neither Mr. Dewar, nor any counsel or agent on his behalf, appeared, the Committee, after they were chosen, were only sworn to try the merits of the two petitions of the voters.

On Thursday, the 8th of February, the Committee being met, the two petitions were read. They are entered in the votes as follows :

“ A petition of the several persons whose  
 “ names are thereunto subscribed, in be-  
 “ half of themselves and others the elec-  
 “ tors of the borough of Cricklade, in the  
 “ county of Wilts, was read ; setting forth,  
 “ That, at the election of a representative to  
 “ serve in Parliament for the said borough,  
 “ in the room of Samuel Peach and John

(1) 11 Geo. III. cap. 42. § 4.

“ Dewar, Esquires, John Dewar, Samuel  
“ Peach, and Samuel Petrie, Esquires,  
“ were candidates; and that Thomas  
“ Carter, a known friend of the said Mr.  
“ Peach, and under the direction of his  
“ agents, presided as bailiff and returning  
“ officer of the said borough, to which  
“ office the said Carter was appointed by  
“ Arnold Nesbit, Esq; the Lord of the  
“ hundred, or manor, of Cricklade, and  
“ friend to the said Mr. Peach, and the  
“ person who introduced the said Mr.  
“ Peach as a candidate for the said bo-  
“ rough; and that the petitioners, and  
“ many others, duly qualified, as well by  
“ the general laws and customs of the  
“ land, as by the particular usage and con-  
“ stitution of the said borough, offered to  
“ give their votes for the said John Dewar,  
“ Esq; but were rejected by the said re-  
“ turning officer, who, under the direc-  
“ tions of the agents of the said Mr. Peach,  
“ took upon himself, arbitrarily and ille-  
“ gally, to return the said Mr. Peach,  
“ although the said John Dewar, Esq; had  
“ a large

“ a large majority of unquestionable legal  
 “ votes, for the said borough; and that  
 “ the said returning officer did, likewise,  
 “ partially admit many votes for the said  
 “ Mr. Peach, which stood precisely in the  
 “ same predicament with many which he  
 “ rejected when offered for Mr. Dewar;  
 “ and did likewise admit many persons to  
 “ vote for Mr. Peach, whom he ought  
 “ not to have admitted, several of whom  
 “ were the immediate and avowed agents  
 “ of Mr. Peach, having no connection  
 “ with the said borough, but who, under  
 “ fraudulent and colourable conveyances,  
 “ were admitted to vote, to the great in-  
 “ jury of the rights and franchises of the  
 “ petitioners, and others, the electors of the  
 “ said borough; and that, by these, *and*  
 “ *other undue, corrupt, and illegal prac-*  
 “ *tices*, the said Samuel Peach, Esq; did  
 “ procure himself to be returned a repre-  
 “ sentative to Parliament, in manifest in-  
 “ jury to the rights of the electors, and in  
 “ open violation of the law and consti-  
 “ tution of Parliament: and therefore  
 “ praying,

“ praying, that the freedom of election  
“ may be restored, and that the said Mr.  
“ Dewar may be received as duly elected ;  
“ and that the House will grant them such  
“ other relief and redress as they shall  
“ think meet (1).”

This was the petition of the six.—

“ A petition of the subscribers, elec-  
“ tors of the borough of Cricklade, in  
“ the county of Wilts, in behalf of them-  
“ selves and others, electors of the said  
“ borough, was also read: setting forth,  
“ That, at the last election of a burghers to  
“ serve in Parliament for the said borough,  
“ in the room of William Earle, Esq; de-  
“ ceased, Samuel Peach, John Dewar, and  
“ Samuel Petrie, Esquires, were can-  
“ didates; and that Thomas Carter,  
“ bailiff of the said borough, who pre-  
“ sided as returning officer at the said elec-  
“ tion, during the poll, acted with the  
“ greatest partiality in favour of the said

(1) Votes, p. 35.

“ Samuel

“ Samuel Peach, rejecting the votes of  
 “ many who had an undoubted right to  
 “ poll, and who tendered their votes for  
 “ the said John Dewar, or the said Samuel  
 “ Petrie; and admitting many to poll for  
 “ the said Samuel Peach, who were in the  
 “ same predicament with those who were  
 “ refused to be admitted for the other can-  
 “ didates, as well as many others who had  
 “ no right to vote at all; and thus, in a most  
 “ arbitrary, illegal, and unwarrantable man-  
 “ ner, depriving great numbers of the elec-  
 “ tors of the said borough of their right  
 “ and franchise, which they had hereto-  
 “ fore exercised for time immemorial; and  
 “ that by these, *and other undue practices*,  
 “ the said Samuel Peach has been unjustly  
 “ returned to serve for the said borough,  
 “ though not duly elected, in defiance of  
 “ law, and gross violation of the freedom  
 “ of election; and that the petitioners pre-  
 “ sented a petition to the House the last  
 “ session of Parliament, setting forth these  
 “ particulars, but which was not then  
 “ heard; and therefore praying the House  
 “ to

“ to take the premises into consideration,  
 “ and to grant them such relief as to the  
 “ House shall seem just (1).”

This was the petition of the fourteen.

There is no last determination of the right of election in this borough; but the following entries in the Journals on that subject were read (A).

1 April, 1689, “ Colonel Birch reports from the Committee of elections  
 “ and privileges,——

“ That it was *agreed* by the counsel on  
 “ both sides, that the right of election was  
 “ in the freeholders and copyholders of the  
 “ borough-houses, and leaseholders for any  
 “ term not under three years: only the  
 “ counsel for Mr. Webb (the sitting member)  
 “ alleged, they ought to be possessed  
 “ of an estate in their own right, and not in  
 “ right of their wives (2).”

After some witnesses had been examined, who proved the usage in favour of persons

(1) Votes, p. 35, 36.

(2) Journ. vol. x. p. 72. col. 1.

having



having estates in right of their wives, Webb's counsel waved their objection to them (1), and there was no question left concerning the right of election.

22 February, 1695-6. " Colone Granville reports from the Committee of privileges and elections (2),

" That it was *agreed*, that the right of election (for Cricklade) was in the freeholders, copyholders, and leaseholders, for not less than three years (3)."

In the years 1698, 1710, 1713, 1720, and 1722, it appears, that petitions were presented, complaining of undue elections and returns for this borough; but there is nothing said in any of them touching the right of election.

The numbers on the poll, as produced by the returning officer, were as follows :

(1) Journ. vol. x. p. 72. col. 2.

(2) Journ. vol. xi. p. 461. col. 1.

(3) *Ibid.* col. 2.

For Peach	—	—	54
For Dewar	—	—	41
For Petrie	—	—	6
			—
Majority in favour of Peach over Dewar	}		13

The counsel for the petitioners proposed,

I. To establish a great many votes as legal, which had been tendered for Dewar, and had been rejected; and also to disqualify others, which had been received for Peach,—so as to leave a clear majority for Dewar.

II. To prove such misconduct in the returning officer, as to call for a special report from the Committee.

III. To prove bribery on Peach, by his agents, so as to disqualify him from being able to retain his seat.

1st Head.] The right of election was allowed on both sides to be as expressed in  
the



the general terms of the two agreements of 1689 and 1695.

But the petitioners contended,

1. That the boundaries of the borough extend beyond the line adopted on the part of the sitting member; and that *seven* houses, for which votes had been tendered in favour of Dewar, and rejected on the ground of their being without, are within, the boundaries.

2. That it is not necessary that the houses, for which votes are claimed, should either be *ancient* houses, or built on *ancient* scites, but that a sufficient estate, in *any* house within the borough, gives a right to vote.

3. That leaseholders for a term of three years, or more, determinable on a life or lives, and persons having leases for that or a longer term, granted by lessors, who have themselves leases for three or more years, but determinable on a life or lives, have a right to vote.

4. That all the three classes of voters, viz. freeholders, copyholders, and leasehold-

ers, and must have resided 40 days in the place, before the election, and must be *parishioners*.

The counsel for the fitting member insisted,

1. That the boundaries of the borough are according to certain limits which they pointed out, and which exclude the seven houses in question.

2. That no houses give a right to vote except *ancient* houses, or new houses built on *ancient* scites; and that what are called *new houses* give no right to vote.

3. That no leaseholder can vote unless his lease be for three or more years *certain*, from a lessor who has an *absolute* estate for three or more years *certain*, and not determinable on lives.

4. That residence of 40 days before the election is necessary only to qualify those who claim to vote as *leaseholders*, and is not required in *freeholders* and *copyholders*; and that *legal settlements* are not necessary to any voters.

Besides the evidence brought by the petitioners to prove the four *points* which they

they wanted to establish in order to make out the first head of their charge, they produced a great deal of other evidence to substantiate the rights of many *individual* voters who had been rejected, as claiming for split tenements, as not having leases for three or more years, or for other reasons; and also to disqualify certain voters, who had polled for the sitting member, as not having *bona fide* estates, but only such as were occasional and fraudulently granted, for the purpose of creating votes at the election.

After the evidence for the petitioners was closed, the counsel for the sitting member informed the Committee that, if they should decide the *general* questions which have been stated, the parties would probably agree about the majority of votes according to their decisions, which would render it unnecessary for them to determine upon the votes which stood on *particular* grounds. That, at least, if *all* the propositions contended for by the petitioners should be established by the Committee,

the sitting member would acknowledge the majority to be in favour of Dewar; and, on the other hand, if *all* the propositions insisted on by them on the part of the sitting member should be confirmed, the majority must be with him. That if the Committee, therefore, should first come to special resolutions, settling the right of election, they would probably abridge their own trouble, and the expence of the parties, and would also, by a judicial declaration of that right, in a borough where there is no last determination of the House, ascertain the law of the place, and prevent future contests.

The counsel on the other side concurred in desiring to have the right of election specially ascertained, and agreed that, if *all* the points were against them, Peach would have a majority.

The Committee assented to the proposal.

In the arguments, therefore, on both sides, the counsel confined themselves to observations on the evidence as to the general points; and, in the event, the Com-

mittee were not called upon to decide concerning any of the votes which stood on particular grounds. For this reason, I have not thought it necessary to preserve what was proved concerning those votes; but I have been careful to state very fully all the evidence that was given on the different questions concerning the right of election (B).—Previous, however, to the account of the evidence, it will be proper to mention what was admitted on both sides, relative to the borough of Cricklade, *viz.*

That it is a borough by prescription, but not incorporated. That the bailiff of the manor of Cricklade is the returning officer. That the bailiff and constables of the borough are chosen yearly at the Michaelmas court-leet, held in the borough, before the steward of the manor of Cricklade. That there is a smaller manor in the borough called the manor of Abingdon Court, which is subordinate to the other, and is held of the dean and chapter of Salisbury, for 99 years determinable on lives. That there are, also, in the borough

charity estates held of the feoffees of the charity, for terms determinable on lives. That the houses in the borough are chiefly held either in freehold, in copyhold, on leases for 99 years determinable on lives, on leases for terms absolute of three or more than three years, and on leases for terms of three or more years under lessees for 99 years determinable on lives. That Mr. Nesbit, lord of the manor, (the other member for the borough) was the active and avowed friend of Mr. Peach, and supported him with all his interest. That the appointment of the bailiff is very much in Mr. Nesbit's power.

### FIRST POINT.

The seven houses which were alleged, by the counsel for the petitioners, to be within the borough, and denied to be within it by the counsel for Peach, lie contiguous to each other, on the east side of the borough, and are built in a strait line fronting the same way. At the time of the election they were in the occupation of the fol-



following persons: Thomas Bound, Thomas Kilmaster, sen. Richard Liddel, William Mabson, John Pound, Robert Strange, and William Wakefield.

# E V I D E N C E

Of the witnesses called by the counsel  
for the petitioners.

*William Archer*—said, He was sixty-five years of age; and was born in, and never a year out of Cricklade. Had heard ancient people, then dead, and particularly his father, who had been dead 40 years, say, that the limits of the borough extend on the east to a certain stone, which (as well as the others mentioned afterwards) is called a Meer-stone; on the west, to another stone on Horseley-down; on the south, to a stone at a gate belonging to one Stephen West; and, on the north, to a bridge called Weaver's Bridge. That he was constable in 1761. That Thomas Bound's house was built in 1732, and has always been in the family of the Bounds. That he had heard ancient people say it was in the borough,

and had always understood it to be so. That he had always understood that the Bounds had voted for it, and that Thomas Bound had, but could not say whether he had seen him vote. He gave nearly the same account of Thomas Kilmaster's house, except that he did not mention the time when it was built. He also said the same as to Richard Liddel's, and added, that, 36 years ago he went with Wellbore Ellis, Esq; to solicit votes, and went to that house. That he saw the possessor at the poll on that occasion, but did not know whether he voted. He gave the same evidence concerning the houses of William Mabson, John Pound, Robert Strange, and William Wakefield, as concerning that of Liddel. He said that Wakefield is the owner of the house, but did not live in it at the time of the election. That one Miffin lived in it.

On his cross-examination on this subject he said, He never had gone in a procession round the bounds himself, but he had



had heard that it had been done once or twice in his time.

*John Skilling*——said, He was sixty-one years of age, and had known the borough of Cricklade fifty years. That he had performed watch and ward upwards of forty years ago, and that, according to the charge given at that time, Thomas Kilmaster's house was within the borough-stone. (☞ Kilmaster's house is the last in the line of the 7—if it is within the boundaries the others *must* be so.) That he always understood that the houses of Thomas Bound, Thomas Kilmaster, Richard Liddel, William Mabson, John Pound, Robert Strange and William Wakefield were within the borough.

On his cross-examination he said, That he received the charge for performing watch and ward from the constable. That his office was the same with that of watchman in London. That the constables are appointed at the leet, to act within the liberties of the borough. That he un-

derstood that their power is only within the limits of the borough, and does not extend all over the parish; and that the constable cannot serve a warrant in the tything of *Chelworth*, (which is contiguous to the part of the borough in question) without carrying it to the tything-man—He said, he had never gone the boundaries of the borough,

*John Crews*——said, He had known the borough of Cricklade forty years. That he was born there. That, ever since he remembered, the seven houses in question were accounted to be within the borough. That, according to the charge of the constable in setting the watch, the boundary, on that side, is the corner of a wall below Kilmaster's house. That the charge was, that they should walk to the boundaries of the borough,—to that wall,—to a gate near Stephen West's,—to Horseley-down,—and to New-bridge or Weaver's-bridge—(Weaver's-bridge is in the same strait line,

line, but a great way beyond New-bridge, northward, on the road to Cirencester.)

On his cross-examination he said, He believed the constable's power extends only to the limits of the borough. That the tything-man never suffers him to go beyond those limits. That he could not say he knew any instance where the tything-man had taken from the constable a warrant which was to be executed without the boundaries of the borough. That he himself never served any borough office \*, and knew what he had said only from others. That, as to the seven houses, they were always reputed to give votes. That he did not remember Bound, or any one else, ever actually voting for his house. That he never knew Kilmaster's vote rejected, till the last election. That he himself had voted at five or six elections, and remembered several that were contested. That, when he performed watch and ward,

\* He must have meant that he never served the office of *bailiff* or *constable*.

he was ordered by the constable to go to the places he had mentioned. That they were to walk thither along the streets— That he had never gone in procession round the boundaries.

*John Haynes*—said, He was sixty-four years of age; was born, and had always lived, at Cricklade; was constable two years; and had served the office of bailiff. That his power as constable, as he always understood it, extended, southward to a stone near Stephen West's gate, westward to a stone near Horseley down, northward to Weaver's-bridge, eastward to the bottom of a stone wall leading to the river Isis. That *these* he apprehended were the limits of the borough. That he never executed any warrants beyond those limits. That he took the limits of the manor and of the borough to be the same. That he had heard ancient people say the boundaries were as he had mentioned. That he remembered six or seven elections, and several of them warmly contested,

contested, and that all the houses within the Meer-stone, on the east, have always been considered as giving a right to vote.

On his cross-examination he said, He had, when constable, served ten or twelve processes in the borough. That he had apprehended persons within the houses said, on the part of the sitting member, to be without the borough. That he remembered a procession round the boundaries above thirty years ago. That many went round at that time, but that he did not go. That there is a bank within the borough, which is said to have been thrown up during the Roman wars, but that he never understood it to be the boundary, and that it cuts off *part* of St. Mary's parish, which is deemed to be within the borough. That he always understood that the limits of the borough and manor are the same, and that the lord of the manor has no jurisdiction without the borough. That the bank, or mound, extends to within about thirty yards of the eastern boundary. That the seven houses are without the mound.

mound. But that he remembered that, when he served on the watch, the constable ordered him to watch to the bottom of the wall where the Meer-stone stands, and also to the other stones he mentioned. That the Meer-stone is sometimes called the borough-stone. That the general report has always been, that the mound was a Roman encampment, but that he had never heard of any thing being dug out of it. That it does not extend, in any part, beyond the limits of the borough. That the constables are chosen by a jury, at the court of the lord of the manor. That the jury take a survey of the borough. That he had gone with them on those occasions, and they always went to the boundaries which he had described. That he had known nuisances, *without* the mound, presented by the jury, as *within* the bounds of the manor,—one about the road being out of repair, about twelve years ago. That he had known persons vote for the seven houses at two contested elections, and never heard, till now, of their being rejected. That he had  
never



never known the occupiers of any of the seven serve on juries, but that he had known persons living beyond the mound, on the *south* side of the borough, serve on juries and in the office of constable; and that he remembered one instance of this since Mr. Nesbit was lord of the manor. That it never was customary to put persons, who lived without the borough, on the jury, or to appoint them to any borough office. That, when he was constable, he always charged the watch to go to the boundaries he had mentioned.

*Jonathan White*—said, He was aged upwards of sixty; had lived fifty years at Cricklade; and served the office of bailiff at the election in 1761, which was contested; Mr. Gore, Mr. Nesbit, and Mr. Earle being candidates. A paper was shewn to him, which he said was a copy of the poll which he took on that occasion. He said, he had then acted on this principle, that all the houses within the borough gave good votes. That Thomas Bound,  
Thomas

Thomas Kilmaster, Richard Liddel, William Mabson, John Pound, Robert Strange, and William Mifflin (for Wakefield's house) voted for the seven houses in question, and that no objections were made to them. That the general opinion always had been, that those houses gave a right to vote, as being freeholds, and within the borough. That the boundaries are, to the north, Weaver's bridge, to the south, a stone near Stephen West's gate \*, to the east, a stone at the corner of Kilmaster's garden, to the west, a place called Horseley down. That he had served the office of constable, but that no watch was then kept. That the steward of the manor has the choosing of the bailiff.

*William Giles*—said, He was aged seventy-five, and had known Cricklade ever since he was born. He gave the same account of the boundaries of the borough as the former witness had given, except that, on the

\* Some of the witnesses called West's gate, Weston's gate.



north-side, he said, the borough terminated at New-bridge; and that there was a stone there to mark the boundary. He said, he had been constable during the rebellion in Scotland, and then gave the charge to the watch, as he had received it himself, *viz.* to go to the limits he had mentioned. That he had served on a jury at the court leet, and that the jury went round to the stones and places he had mentioned, to see that there were no nuisances.

*George Simmonds*—said, He was fifty-eight years of age, and had known Cricklade upwards of fifty years. That he had served the office of constable; and, in that capacity, had executed warrants, according to the boundaries described by William Giles, (northward only to New-Bridge) and that he had also watched to those boundaries.

*Morgan Byrt*——said, That the house, in right of which one James Vincent had voted (for the sitting member), is *without* the mound, but had always been deemed to give a vote. That he made a map of the  
borough

borough about two or three years before the election, which he had copied from the surveyor's plan. That, in imitation of that plan, he had in his map (which was produced) *called* the mound, the boundary of the borough, but did not know it to *be* so. That some said it was, and some not. That it had of late been called the borough-bank; but that he had never heard it called so till lately. That it is thought to have been formerly a fortification. That, besides Vincent, there were several others who voted for the sitting member, in right of houses without the bank; and he named some of them, whose houses lay without it, on the north-side of the borough, where he said Mr. Nesbit had a great many houses. That the bank is plainly to be seen, except where the streets are.

It was proved, that six, of the seven persons who had claimed to vote for the houses in question, were, and had been, in possession a considerable time before the election; and the counsel for the petitioners admitted, that Wakefield was not in possession at the time of the election.

## EVIDENCE

Of the witnesses called on the part of the sitting member.

*William Saunders*——said, He was seventy-four years of age ; was born at Cricklade ; and had lived there the greatest part of his life, except the last ten or eleven years. That he had served once on a jury, but never went with the *annoyance jury*. That he had been intimate with Richard Byrt, grandfather to Morgan Byrt, who was upwards of seventy when he died, and who had given him the following account of the boundaries of the borough. That, on the south-side, by the causeway leading to Burton-stone, there is a stone called the borough-stone, which is the south boundary,—(that this had been confirmed by the witness's father). That, eastward from that stone, the boundary crosses a lane, into what is called Paul's croft, and is distinguished by a bank called the borough-bank. That then, turning northward, and including the house of one Townshend, it crosses Calcut lane, into Dennis's ground,

where the bank appears again, and then runs to Abingdon Court. That, from Calcut lane, the boundary, leaving the bank, crosses over to Hatchet green, then goes northward to New bridge, and thence to a place called Horseley down. That, from Horseley down, it goes southward about a furlong, down a lane, by the parsonage ground, which it leaves within the borough; and, lastly, runs eastward, across a green or common, to the south stone. He was not clear, whether the boundary, in crossing Calcut lane, excluded the houses of the Stranges. (There is a house of John Strange in the same row with the seven in question, and next to that of Robert Strange, but on the borough side.) He said, that, by the custom of the borough, every inhabitant takes it in his turn, to make a list of the inhabitants within the borough. That Mr. Byrt had always told him, that the houses in Calcut lane, without the line he had described, were without the borough; and that Byrt always directed the inhabitants of those houses to go to another court. That  
he

he (the witness) had been in court, and seen them struck off the list, several times. That they had indeed been several times called to the court by the steward; but that it was always during the absence of Mr. Byrt, who never allowed that they were within the borough, but said they belonged to the tything of Chelworth.

On his cross examination he said, That, from Abingdon Court to New-bridge, the boundary is marked by the river. That it crosses the river at Town-brook, near the Horse Pool. That he had never gone the boundaries. That he never knew the men, who lived in those houses in Calcut lane which his line excludes, serve on juries. That they might come to the court as other people did, to hear. That he had lived in London for the last eleven years, and did not know the gentlemen concerned in this election. That old Mr. Byrt had great influence. That he had known him direct the steward to strike off names from the list; but that the inhabitants, for the most part, put them on again. That he never was present at

any contested election. That the houses in question were built since an election which happened after the south-sea affair. That he believed they were built with a view to make votes. That it had been disputed whether they were, or were not, within the borough ; but that the most general opinion was, that they were not. That the mound is, and has been, for several years, called the borough-bank ; but that it is not considered as the boundary of the borough. That Strange's house was, as nearly as possible, *on* the borough-bank ; but that, if there was any difference, it was rather more without than within it.

*John Mifflin* — said, He was seventy-four years of age ; and was born, and had lived many years, in Cricklade. That he had lived the last thirty years in London, but had been at Cricklade lately a great many times. He gave an account of the boundaries of the borough, nearly the same with that given by the former witness, but less distinct. He said, he never had been constable, nor kept  
watch



watch and ward; and that he had never gone round the boundaries. That it was forty years since he first left Cricklade; but that he had been backwards and forwards since; and had voted there.

Such was the evidence given on both sides with regard to the boundaries of the borough.

## SECOND POINT, *viz.*

Whether *all* houses within the borough, the estates in them being such as are required, give a right to vote, or only *ancient* houses, and such as are built on *ancient* sites.

## EVIDENCE

Of the witnesses called by the counsel for the petitioners.

*William Archer* (1)—said, He had known owners of *new* houses vote, and never knew them rejected, till the last election. That Oliver Adams's house, in the middle of the borough, which has not been built twenty years, Thomas Barrett's, also in the middle

(1) *Supra*, p. 21.

of the borough, William Fry's, built in 1720, Mark Pyke's, built about thirty-one years ago, Edward Snell's, built in 1720, John Strange's, contiguous to Robert Strange's, Neville Simmonds's, built twenty years ago, and John Tinson's, built about fifty years ago, (several of which are in Calcut lane, and in the same row with the seven houses,) have always been understood to give a right to vote.

On his cross-examination, he said, That, a little before some of those houses were built, there had been a fire; but that *that* was not the reason of their being built, they being situated at the distance of a furlong from the place where the fire happened. That, except on the present occasion, it never had been disputed, that those houses gave a right to vote; and that persons had voted for them at contested elections.

*Robert Strange*—said, He was seventy-five years of age; that he was born, and had always lived, at Cricklade; and was father to John Strange. He specified the houses mentioned in Archer's evidence, and a great many  
3 others,



others, the proprietors of which had been rejected at the poll, on the ground of their houses being *new* ones. He said, those houses had always been considered as giving a right to vote; and that he had known them voted for, at several elections.

On his cross-examination, being asked, if he had not heard old people say, that only *old borough*-houses gave a right to vote, and that the number of voters did not exceed four score, he answered, That he had always heard, that all but *split* houses gave a right; that he never remembered the voters so few as four score; and that, at Mr. Dunn's election, sixty seven years ago, seven score voted.

*John Skilling*——(1) said, He had never known *new* houses objected to, till the last election. That he had known them voted for at contested elections, as far back as forty years ago. That there was a fire at Cricklade in 1723, and that new houses were built after it, which were always understood to give a right to vote. He speci-

(1) *Supra*, p. 23.

fied some of the houses mentioned by Archer and Strange.

On his cross-examination he said, He had been present at elections where persons voted for *new* houses built on new ground, though they stood perhaps where old houses might once have stood. That he had never heard old people say, it was a disputed point whether *new* houses entitled to vote. That he had known objections started to them before the present occasion, but never knew them rejected at a poll.

On being re-examined, he said, that all the houses he had specified, except Adams's, were on new ground; and that he never knew a distinction made between new and old ground. That he had known the ground where those houses stood, when it was in gardens, but that old foundations had been found in it (1).

(1) It appears, by Camden, and the red book of the exchequer, that Cricklade was once a considerable place, and much more extensive and populous than at present.

John

*John Crews*—(1) said, It had been *talked*, that there was a distinction between *new* and *old* houses, as to the right of voting; but he never heard any objection made to new houses at a poll, till now, and he had been present, and had voted, at five or six elections,—some of them contested.

*John Haynes*—(2) said, He had never heard any objection made to *new* houses before the last election. That he had known all the new houses, which had been specified, voted for at contested elections, except one, which had been built posterior to any contested election except the last. That he never had heard any distinction made between *new* and *old* houses by the inhabitants, but that it was always understood, that *new* as well as *old* gave a right to vote.

On his cross-examination he said, He had never heard it disputed among old people whether *new* houses, although not on *old* foundations, gave a right to vote. He mentioned several of the *new* houses, which, he said, he knew were not built

(1) *Supra*, p. 24.

(2) *Supra*, p. 26.

on *old* scites, and for which, notwithstanding, he had known votes received at contested elections.

*Jonathan White*—(1) said, He had never heard any distinction made between *old* and *new* houses, as to the right of voting, before the last general election. By the copy of the poll, which he had taken, in 1761, it appeared, and it was admitted on the part of the sitting member, that eight of the new houses which had been mentioned by the other witnesses, had been voted for at the election in that year.

On the part of the sitting member, nothing was asked of William Saunders concerning the *new* houses.

*John Mifflin*—(2) said, That, at the election where Mr. Wellbore Ellis and Mr. Reid were candidates, many who claimed to vote for *new* houses were rejected, and that he was present when they were rejected.

On his cross-examination he said, That some of the votes so rejected were tendered for Ellis, and some for the opposite party.

(1) *Supra*, p. 29.

(2) *Supra*, p. 36.

## THIRD POINT, viz.

Whether persons having leases of houses within the borough for three or more years, determinable on a life or lives, or leaseholders for three or more years under lessors who have estates for that or a longer term, but determinable on a life or lives, have a right to vote.

## EVIDENCE

Of the witnesses called on the part of the petitioners.

*John Haynes*—(1) said, He remembered six or seven elections, of which some were very warmly contested. That there are, in Cricklade, a great many leases for 99 years determinable on three lives, and many for three years under those for 99 years. That both the one sort and the other have always been considered as giving a right to vote, and that persons claiming to vote for them were never rejected, till the last election. That he had never heard them even objected to, till the

(1) *Supra*, p. 26.

last general election (1), though he had seen persons produce leases of both sorts at the poll, to prove their titles, and had seen them vote after their titles were so proved.

*Jonathan White*, (2) who had been returning officer in 1761,—said, That, on that occasion, when Mr. Gore, Mr. Nesbitt, and Mr. Earle were candidates, no objection was made, by Nesbitt, to persons having leases (either of feoffee lands, or under Dr. Heberden) of leases for 99 years determinable on lives. That they were received as good voters, for each of the three candidates. That they were always deemed good voters, and that he never heard any objection to them till of late. That, at the late general election, they were admitted (in general) to be good voters, and were never refused till this last election.

*William Giles*—(3) said, He remembered election ever since he was twenty years of age,

(1) There was some confusion in the account given by the witnesses of the leaseholders rejected at the general election in 1774.

(2) *Supra*, p. 29.

(3) *Supra*, p. 30.

and



and some of them contested. That he himself had a lease for 99 years determinable on lives, and had a tenant under him who had voted at several elections. That it had always been allowed, till this last election, that both the sorts of leaseholders in question had as good a right to vote as any freeholders. That lessees under Dr. Heberden, and under the feoffees, had always been reputed to have a right to vote, and were never, before, rejected.

The counsel for the sitting member did not examine their witnesses to this point.

#### FOURTH POINT, *viz.*

Whether, in order to be entitled to vote, a person must have been resident 40 days before the election, and must be a parishioner of Cricklade; or whether, as the counsel for the sitting member contended, residence of 40 days be necessary to leaseholders only, and not to freeholders and copyholders, and the being a parishioner, in any other manner, equally unnecessary to all the three classes.

EVI-

## EVIDENCE

On the part of the petitioners.

*John Haynes*—(1) said, That it was always considered as necessary to every voter to be a parishioner, and to have been resident 40 days.

*Jonathan White*—(2) said, That it was always supposed, that voters of all the three classes, must have been resident 40 days before the election. That he recollected one, and only one, instance, of a person having been rejected because he had not resided 40 days before the poll. That this was at the election in 1761, when he was returning officer. He said, that a voter must be a parishioner, having resided 40 days. That, if he was not a parishioner, he had no right to vote. That he must have a parochial settlement at Cricklade.

On his cross-examination he said, That a man renting under 10 *l.* a year, although he should have resided 40 days, would not have a right to vote, unless he were a pa-

(1) *Supra*, p. 26.

(2) *Supra*, p. 29.

rishioner,



tioner, and had gained a settlement before.

*William Giles*—(1) said, That it is necessary for every voter to be a parishioner; and that a lessee of less than 10 *l.* a year, although he should have resided 40 days, would not be a parishioner.

*George Symmonds*—(2) said, It was understood that voters must be in the actual occupation of their houses for 40 days preceding the poll, and that they must be parishioners; that is (said he) they must rent 10 *l.* a year. On being asked if he thought *that* the only way of gaining a settlement, he said he did not know.

*William Archer*—(3) said, It had always been the custom that the voters should be resident 40 days before the election. That he himself had once tendered his vote, and had been rejected, because he had not been resident 40 days. That no persons of any of the three classes were ever received

(1) *Supra*, p. 30.

(2) *Supra*, p. 31.

(3) *Supra*, p. 21.

without this qualification. That, at the last election which happened in the reign of George I. his father had an estate of 70*l.* a year, part freehold, part copyhold, and part leasehold. That he lived in the parish, but not in the borough; and that his estates lay, some within the borough, and some within the parish. That, being asked to vote, he consulted the steward of the lord of the manor, who told him, that, to entitle himself to vote, he must reside within the borough 40 days. On being asked, if a man who had served a seven years apprenticeship in the *parish*, but not in the *borough*, and who should take a lease for three years within the borough, would have a right to vote without having resided 40 days; he said he would not: And, being asked if a man who should rent a house of 4*l.* a year, and live in it for more than 40 days previous to the election, would have a right to vote; he said he would have a right, *if he were a parishioner.*

*John Skilling* — (1) said, It was necessary to be a parishioner of one of the two parishes in Cricklade, and to have resided 40 days before the election. That he had always understood that freeholders, copyholders, and leaseholders, must be resident 40 days. That such had always been the practice, as far as he could remember. That he remembered one or two persons rejected, although they were parishioners, because they had not occupied their houses 40 days, and that the returning officer assigned *that* as the reason of his rejecting their votes. That it was sufficient if a man's family resided, although he himself should be absent on business. That, by parishioners, he meant persons entitled to a settlement by birth, apprenticeship, (or servitude) and covenanted servants. That, if a person has served a seven years apprenticeship within the borough, and has a house, still he cannot vote without 40 days previous residence.

(1) *Supra*, p. 23.

*William Saunders*—(1) said, He had always heard that non-residents have no right to vote, and that both freeholders and copyholders must be in the occupation of their premises. That if they were not, they had always been considered as illegal voters. That non-resident freeholders were indeed admitted at the general election, and at the late one. That Mr. Nesbitt first began to poll them, and that they were objected to by the opposite party; but were afterwards received to vote on both sides. That before the last general election, he never knew a man allowed to vote who was not a parishioner, and in the occupation of the premises for which he claimed. That he believed there had been instances of freeholders voting without having been resident 40 days. (This he said *generally*; but it would seem that he *meant* to say only, that such instances had happened at the last general election; for, being afterwards asked if he had ever known in-

(1) Not the same with the person of that name who was called on the part of the sitting member. *Supra*, p. 33.

stances of persons being admitted to vote who had not been in possession 40 days before the election, he answered, "Yes; at *the general election before the last election.*")

*Morgan Byrt* — (1) said, He never knew any body vote without being in possession, till the last general election. That a freeholder cannot vote for his own house without being in possession of it.

## E V I D E N C E

On the part of the sitting member.

*William Saunders* — (2) said, That a freeholder of a house had a right to vote for it, provided he had not conveyed it to another, even although he did not live in it. That he had known persons vote who had not been at Cricklade for years. That he recollected one Thomas Hindar's having voted as a freeholder, without any objection being made to him, although he had been absent twenty years. That he believed a copyholder or a leaseholder must be resi-

(1) *Supra*, p. 31.

(2) *Supra*, p. 33.

dent ; but he never heard how long a residence was necessary.

*John Mifflin*— (1) said, He had once understood what constituted the right of voting, but that having been long absent from Cricklade, he could not now give any good account of the matter. He seemed to say, that he conceived that freeholders, though non-resident, might vote.

II<sup>d</sup> Head.] On the second head, a great deal of evidence was produced on the part of the petitioners, to show, That the returning officer had acted with gross partiality towards the sitting member. That he had determined the disputed points, relative to the right of election, in the manner which he thought most likely to give a majority to Mr. Peach. That he had not even adhered to the rules which he himself had laid down, but had admitted votes for Peach, which were in the same circumstances with others tendered for Dewar which he rejected. That he followed the

(1) *Supra*, p. 36.



directions of the counsel who attended for Peach.

(He was the same returning officer who had presided at the election immediately preceding (1), and at the last general election.)

III<sup>d</sup> Head.] The counsel for the sitting member objected to any evidence being received on this head. They contended, That bribery was not alleged in any of the petitions before the Committee. The words, "*other undue, corrupt, and illegal practices,*" which were contained in the petition of the six electors (2), were, they said, too general and indefinite, to entitle the petitioner to go into the proof of so special and weighty a charge as that of bribery. That it could not be supposed, that those words contained a sufficient notice to the sitting member, for him to prepare himself against that particular charge; and therefore, that it would be unjust to put him on his trial be-

(1) *Vide supra*, vol. i. Case of Cricklade, p. 293, to 314.

(2) *Supra*, p. 9.

fore the Committee for that offence. That the words in question, being placed at the end of the petition, could not be understood to imply any thing, but were to be considered as mere words of course, like the "*et alia enormia fecit*," ("*and other wrongs did*") in a declaration, in an action of trespass.

On the other side, it was insisted, That arguments, drawn from the narrow and technical rules of special pleading, ought not to be introduced into election causes, or applied to the construction of petitions. That the words "*corrupt practices*" particularly pointed at bribery, which is the sort of corruption most commonly made use of at elections. That, in the *body* of the statute of 2 Geo. II. which, in the *title*, is called an act for more effectually preventing *bribery* and corruption in the election of members to serve in Parliament, the term bribery never occurs; and that the preamble begins thus:—"Whereas it is found by experience, that the laws in being have not been sufficient to prevent *corrupt and illegal practices* in the election of members



“ bers to serve to Parliament ; for remedy,  
 “ therefore, of so great an evil, &c. (1).”  
 That the words “ *corrupt and illegal prac-*  
 “ *tices,*” therefore, (the allegation of the  
 petition,) are so peculiarly expressive of  
 bribery, that they are the words by which  
 the legislature has chosen to express it, in  
 a law made directly against that offence.

The court being cleared, the Committee,  
 after deliberation, came to the following  
 resolution.

Resolved, “ That the Committee are of  
 “ opinion, that the counsel for the peti-  
 “ tioners are at liberty to enter into the  
 “ proof of bribery by Samuel Feach, Esq;  
 “ it being comprehended in [the words]  
 “ *corrupt practices* alleged in the petition.”

Upon this, the evidence was gone into ;  
 and other evidence to contradict the charge .

(1) 2 Geo. II. c. 24. § 1.

was afterwards produced on the part of Mr. Peach.

On the evidence concerning the different points which were included under the 1st Head, the counsel for the petitioners observed as follows :

1. The evidence on the first point proves, in the completest manner, that the seven houses, which were held by the returning officer *not* to be within the limits of the borough, *are* within those limits. It is true, that some of the witnesses called on the part of the petitioners carry the boundary farther than others, towards the north, but they all agree in making it include the seven houses. These witnesses are old men, who, by serving on juries, by performing watch and ward, and by acting as constables, have had the best opportunities of knowing the extent of the borough. It is also proved, that the houses in question have always been voted for, till the last election. To contradict the witnesses of the  
peti-

petitioners, on this, and the other points, relating to the right of election, the only evidence which the lord of the manor, after the researches of a year and a half, has been able to produce, is that of two men, who have not for a long time resided in Cricklade. The mound, which, in a map copied from one prepared by the orders of the lord of the manor, is called the boundary of the borough, has been proved never to have been thought so, but to have been all along looked upon as the remains of a Roman encampment. Indeed, on the part of the sitting member, it has been made the boundary *only* where it served to exclude the seven houses. Had it been followed quite round the borough, it would also have cut off eleven votes from the sitting member \*; but, wherever *that* was necessary to serve his purpose, his witnesses have extended the limits beyond it.

2. The evidence, on the second point, is equally strong and unimpeached. Unless

\* This was admitted.

it could be contended that this is a bur-gage-tenure borough (to which it does not bear any resemblance), the idea of *ancient* scites and *ancient* houses must be relinquished. If the assertion of the sitting member on this point were well founded, the number of houses and scites, to which the right of voting is annexed, would be fixed and certain, and would not have varied, as it has done, at different periods of time.

3. On the third point, the usage is as clearly proved as on the two former; and the witnesses called by the counsel for the sitting member have said nothing to contradict it. And,

4. On the fourth point, all the witnesses called on the part of the petitioners agree, that a residence of 40 days is necessary, to voters of *all the three classes*. With regard, indeed, to the necessity of having a parochial settlement, over and above the 40 days residence, the evidence is not so clear and satisfactory. But this will not appear surprising, when it is considered,  
that

that all freeholders, copyholders, and lessees of more than ten pounds a year, of one or other of which classes the greater part of the electors is composed, need only a residence of 40 days to gain a settlement. Concerning *them* no question about settlement could ever arise, because they were necessarily settled before they could be otherwise entitled to vote. It is only to lessees of less than ten pounds a year, that something more than a 40 days residence is necessary to gain a settlement. Hence instances of objections for want of a settlement, to persons who had resided 40 days, must have been rare, and it is natural that there should not be much evidence on this matter.

The counsel for the sitting member said,

1. On the first point, That there was a contrariety in the evidence, produced on the other side, concerning the limits of the borough. That, to shew the mound to have been a Roman encampment was no answer to any arguments which proved it to be, in some places, the boundary;

dary ; for that, in founding boroughs, such vestiges of encampments had often been adopted as their boundary.

2. On the second point they said, That although all boroughs, in which the right of election is annexed to houses, have, probably, in their original, been burgage-tenure boroughs, yet, alterations in that respect had, by degrees, crept into many of them, and into this of Cricklade in particular. That, now, leaseholders for lives are allowed to vote, which is contrary to the nature of burgage-tenure boroughs. That it appeared, however, by the words of the agreement in 1689 (1), that this borough retained, in a great measure, what must be supposed to have been the ancient right of election. That the right is there declared to be only in the freeholders, copyholders, and leaseholders, of *borough-houses*. That by the expression "*borough-houses*" must have been meant the ancient borough-houses existing at that time ; and that, as the right of voting is by prescription,

(1) *Supra*, p. 12.



tion, those houses only can be considered as *ancient borough-houses* which are built on foundations where houses stood beyond the memory of man (C). That, as the right is agreed to be in houses only, and not in land on which there are no houses, it is natural that the number of voters should be different at different times.

3. On the third point they argued, That, by a fair legal construction of the account of the usage contained in the agreements of 1689 (1) and 1695-6 (2), it must be understood that persons claiming to vote as leaseholders, must have an estate *certain* for at least three years. That a tenant for a term determinable on lives cannot be said to have such a certain estate, because his interest may be at an end in less than three years. That a lawyer, when he hears of a lease for three years, always understands that such a lease is meant as *must* continue for that term.

4. As to the fourth point they said, That, from the agreements, it was evident

(1) *Supra*, p. 12.

(2) *Supra*, p. 13.

that



that residence was not necessary to freeholders and copyholders. That nothing is said in them as to residence, and therefore it must be presumed not to be necessary, because, in boroughs where the right of election is in freeholders, no such qualification is in general required. That even the witnesses on the part of the petitioners had not said that they recollected any instances of freeholders, or copyholders, having been rejected for non-residence; and that, in what they had said concerning the necessity of residence, the Committee would not think them worthy of unreserved credit, when it was considered that it was their interest, as voters, to confine the right to persons in their own circumstances. That a statutory parochial settlement could still less be thought necessary, because here the right of voting is *prescriptive*, and must be understood by the Committee to have been fixed long before the statutes concerning settlements (C) were made. That, in the agreements of

1689 and 1695-6, no mention is made of settlements any more than of residence. That those agreements are a sort of written traditional evidence of the right, and much more to be relied on than the loose hearsay of old persons; and that, if a settlement were a necessary qualification, it must have been taken notice of either in them, or in some of the subsequent petitions complaining of undue elections for this borough. That there is no instance of any borough with a prescriptive right of election, where a parochial settlement is a necessary qualification, or where the right of voting is made to depend on the poor laws, unless it has been so established by a last determination of the House (C).

In reply, the counsel for the petitioners insisted,

That, as this was allowed not to be a burgage-tenure borough, the words "*borough houses*" in the agreement of 1629, could only mean houses within the borough; and that, in the agreement of  
1695-6,

1695-6, those words were not found. That the right of persons having leases for three or more years, determinable on lives, rested, like all the other points, on usage, and was as strongly supported by the evidence. That leases, for a shorter term than three years, must have been excepted, from the suspicion to which they were liable of *occasionality*. That a lease for three years, determinable on three lives, had as little chance of being occasional, as one for three years not subject to such contingent determination; and that a lease for a longer term, determinable on lives, although there was a *possibility* of its expiring *before* the end of three years, yet, from the *probability* of its continuing *longer*, might be considered as giving a better interest, and was therefore less likely to be occasional. That what was said of residence not being mentioned in the agreements, as a necessary qualification, would apply to leaseholders, as well as to freeholders and copyholders; and yet the counsel for the sitting member admitted, that, to leasehold-  
ers

ers, residence was necessary. That, as to parochial settlements, though they have been regulated and modified by the statutes concerning the poor, yet many were of opinion that they existed at common law independent of the statutes, before the reign of Richard the IId, and that some even carried them as far back as the time of the Saxons.

The Court being cleared, the Committee, after deliberation, came to the two following resolutions, which they communicated by their Chairman to the counsel :

Resolved, “ That it is the opinion of  
 “ this Committee, that the right of vot-  
 “ ing for members to serve in Parliament,  
 “ for the borough of Cricklade, in the  
 “ county of Wilts, is, in the inhabitants  
 “ possessing houses within the said borough,  
 “ who are freeholders, copyholders, or  
 “ leaseholders for any term not less than  
 “ three years, or for any such term, or  
 “ greater term, determinable on life or  
 “ lives ; such freeholder, copyholder, or

“ leaseholder having been in the occupa-  
 “ tion of the house for which he may  
 “ claim to vote 40 days preceding any  
 “ election.”

Resolved, “ That it is the opinion of  
 “ this Committee, that the houses which  
 “ were in the occupation of Thomas Bound,  
 “ Thomas Kilmaster, senior, Richard  
 “ Liddel, William Mabson, John Pound,  
 “ and Robert Strange, at the last election  
 “ of a member to serve in Parliament for  
 “ the borough of Cricklade, in the county  
 “ of Wilts, are within the boundary of the  
 “ said borough.” (B)

✎ It follows, from this last resolution,  
 that the Committee were of opinion, that  
 the house of William Wakefield also is  
 within the boundary of the borough, since  
 it is situated in the same row with the others,  
 and to the west of Kilmaster's. It pro-  
 bably was not specified, because Wakefield,  
 who tendered his vote for it, was not the  
 occupier, and, therefore, according to the  
 first resolution, had not a right to vote.

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The counsel for the sitting member, when they were acquainted with these two resolutions, informed the Committee that they would give them no further trouble.

In the course of the cause the following points of evidence were determined.

1. When William Archer was asked, Whether he had known persons admitted to vote for *new houses*, the counsel for the sitting member objected to the question.

They said, That the polls were better evidence of this fact, and therefore no other evidence could be received concerning it, until it was proved, either that no polls had been taken, or that they were lost.

To this it was answered, that there was no proof of any polls having existed. That a poll is no necessary part of an election, and that, when one is taken, it is no record, and is seldom preserved.

In reply, it was said, That a poll, though not a record, is a judicial instrument. That

it is not a sufficient answer to the objection, to say, that there is no law for preserving polls, for that neither is there any law for the preservation of private deeds and writings, and yet, till it has been shewn that they are lost, no parole evidence can be received concerning the matters which they would prove. That, although a poll is not absolutely necessary to an election, it is to be presumed, until the contrary is proved, that a poll was taken; and that the petitioners, in order to entitle themselves to the evidence now offered, should have given notice to produce the polls, and thereby shewn that they had done what lay in their power to get at the best evidence.

The Committee determined that the evidence was admissible.

2. George Simmonds being asked as to the point of residence and settlements, and having declared that he was a voter, and had a settlement, the counsel for the sitting member objected to his evidence on that point.

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They



They said, He was interested to narrow the right of election, and confine it to persons of the same description with himself.

It was said on the other side, That it had always been the practice, where a witness's right to vote was admitted on all hands, that he should be received to prove any thing relative to the right of election; and that the value of a vote, in the eye of the law and the constitution, is as great where there are a thousand concurring votes, as where there are only an hundred.

The Committee, after deliberation among themselves, informed the counsel, that they did not think the witness so interested as to be incapacitated from giving evidence (1).

3. Before the counsel on both sides had agreed that the sense of the Committee should be taken on the general points of the right of election, a great deal of evidence was produced to prove the titles of individual voters; and, with regard to these,

(1) *Vide supra*, vol. i. p. 360.

the following general question was argued and determined.

The question was, Whether, in order to substantiate a vote, it was necessary to produce deeds to the Committee which had been produced at the poll, and admitted by the returning officer.

The resolution of the Committee was as follows:

Resolved, "That, any deed upon which  
 " a voter claims to vote, such vote being  
 " objected to by the parties, must be pro-  
 " duced to the Committee, or proof given  
 " that such deed is unduly withheld or  
 " lost, before the Committee can admit  
 " other evidence, as sufficient to substan-  
 " tiate the vote."

4. The *possession* of several voters (whose *title* to vote as belonging to any of the three classes was denied, and who had tendered their votes for Dewar) was proved. This was *primâ facie* evidence of their being freeholders; but it appeared, by a check-book which had been produced on

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the part of the petitioners, that those very persons had claimed as leaseholders, for terms determinable on lives, and that they had been rejected, on the ground of that title being insufficient to give a right to vote.

On the part of the petitioners, it was contended, That, if their being freeholders was controverted on the ground of their having *claimed* as leaseholders, it was incumbent on the sitting member to produce the leases.

The counsel for the sitting member insisted, That, as it appeared from the check-book, which the counsel for the petitioners themselves had delivered in as evidence, that the persons in question had claimed as leaseholders, it was now incumbent on *them* to produce the leases, to shew that those men had the titles under which they had claimed to vote. That it is the known practice in ejectments, (to which a trial before a Committee, whether a man really has the estate by which he claims to be a voter, may be very properly compared) that, if the plain-

tiff's witnesses, after having proved his possession, shew, on cross-examination, that he claimed by a deed, the plaintiff must produce and give oyer of the deed.

There was no express determination on this question; but the counsel seemed to understand the sense of the Committee to be, that the *petitioners* must produce the leases; and accordingly, the counsel for the petitioners, (having, by the direction of the Committee, proceeded, during the rest of that day, in proving the possession of other voters in the same predicament,) on a subsequent day produced the leases; which amounted to a waver, on their part, of the point in dispute.

5. The lease of one William Little was produced, to shew that he was a leaseholder for three years. It was attested by a subscribing witness, but Morgan Byrt, who had *not* subscribed it, was called to prove the execution, as having been present on the occasion. It was not alleged that

that the subscribing witness was either dead, or kept out of the way by the opposite party.

The counsel for the sitting member objected to Byrt's being examined on this matter, his testimony not being the best evidence.

To this it was answered, That, though witnesses are necessary to the execution of deeds, yet the subscription of those witnesses is not necessary; for that a deed is perfectly valid, although not subscribed, provided there is testimony to prove the execution. That this being the case, any witness who saw a deed executed is as competent to prove the execution, as he who subscribed it; and that the main use of subscription by the witnesses is, to serve as a memorandum, or indication, to point out who the persons are, who can prove the execution.

In reply, it was said, That although, when a deed is not subscribed by any witness, a person who saw the execution may  
be



be competent to prove it, yet, when it is subscribed by a witness, the case is very different; for that then, if the subscribing witness is not called, it must be presumed that the party neglecting to call him is afraid of his evidence.

The court being cleared, the Committee deliberated for some time; after which, the counsel being called in were asked, whether a witness to the execution of a deed, might not sign it at a time subsequent to the execution. (In the mean time, while the counsel were out, Byrt had actually signed the lease.) It was agreed, on the part of the sitting member, that a witness might sign subsequent to the execution, and that no line had been drawn by the law, as to the length of time after the execution, within which he might subscribe. On this, the court being cleared again, the Committee, after deliberation, came to the following resolution, which they communicated to the counsel :

Resolved,

Resolved, " That it is the opinion of  
 " the Committee, that Morgan Byrt is at  
 " liberty to give evidence of the execution  
 " of the lease."

6. Thomas Skilling having been called, on the part of the petitioners, to prove bribery by Mr. Peach, it appeared, that he had signed the petition of the 16 voters. On this ground his evidence was objected to as inadmissible. But, as the petition which he had signed was not that which, according to the resolution of the Committee, contained the charge of bribery, the objection was over-ruled.

7. Henry Beale was called by the counsel for the sitting member, to prove, that non-resident freeholders have a right to vote. It appeared, that he himself was a non-resident freeholder. On this, his evidence was objected to, as being incompetent to prove his own title.

It was observed, That this was a very different case from that of George Simmonds,



monds, for that *his* right to vote was admitted (1). That it might reasonably and properly be held, that a voter, with whom a great number of others concur, has as high a franchise, as one who has a smaller number joined with him, and, of consequence, that he is not interested in lessening the number: But that, where the question is, whether persons of a certain description have a right to vote or not, it could never be maintained, that a man, whose *only* claim is, that he is of that description, has no interest in saying that they have a right.

The Committee resolved not to admit the evidence,

On Monday, the 19th of February, (the same day on which the counsel had finished their arguments) the Committee, by their Chairman, informed the House, that they had determined,

(1) *Supra*, p. 68, 69.

That

That John Dewar, Esquire, was duly elected, and ought to have been returned (1).

They made no special report (2).

(1) Votes, p. 339.

(2) *Vide supra*, vol. i. p. 33.

## N O T E S

ON THE SECOND CASE OF

## C R I C K L A D E.

PAGE 12. (A) The counsel did not, on either side, take notice of a prior case concerning this borough, where there was a similar agreement, viz. 10th June 1685. "Sir Chr. Musgrave reports (concerning the election for Cricklade);"

"That it was agreed by the counsel on all sides,  
 "That the right of election for the borough of Crick-  
 "lade, is in the freeholders, copyholders, and lease-  
 "holders, for three years." Journals, vol. ix. p.  
 732. col. 1:

It is observable, that the words, "*borough houses*," are not in this agreement.

P. 19. 66. (B) I had occasion to observe, in the introduction to this collection, (*supra*, vol. i. p. 32, 33.) that unless the decisions of former Committees, on the right of election in maiden-boroughs, shall be considered by subsequent Committees, as of at least equal authority with adjudged points in the courts of Westminster-hall, all the advantages attending the provision of 2 Geo. 2. cap. 24. for making last determinations

tions final, will probably be lost, and the intention of the legislature entirely frustrated, with regard to such boroughs, by the establishment of the new judicature. Some have indeed thought that, to prevent this inconvenience, the statute of 10 Geo. III. should have enacted, that resolutions of Committees, on the right of election, should have the same *conclusive* force as those of the House formerly had by virtue of the act of 2 Geo. II. I own I am not of that opinion. Nothing but the gross and repeated contrarieties in the decisions of the House, previous to the passing of that statute, would have justified the clause rendering last determinations final. The meaning of Parliament was clearly this:—There will be infinitely *less* inconvenience from making the last determination of the House unalterable, and as binding as an act of Parliament, let such determination be ever so gross, and contrary to evidence, than is now experienced from the confusion and perpetual litigation, occasioned by the jarring decisions which succeed one another, every time the right of election in the same borough comes to be disputed. The ground, therefore, for making this law being the acknowledged caprice or corruption of the *old* judicature, there cannot be any reason for extending its operation to Committees under the *new* judicature, because caprice or corruption are not, and I hope never will be, imputable to them. The proper medium undoubtedly is, that decisions of Committees, if formed on mature deliberation, should have equal weight, not with an act of Parliament (as last determinations have), but with judgments of the courts of common

common law on questions competent for them to decide.

The present case was the first, since the 10th of Geo. III. in which the general right of election in a maidenborough, came fully before a Committee. Hence, when the trial came on, it appeared to me of great consequence, that the general points should be well considered, and the completest evidence of the usage produced. This was done; and, to satisfy those who may read the account of it that the resolutions were not formed till such evidence had been laid before the Committee, I thought it very essential to state every circumstance of the proof on the different points as separately sworn to by *all* the witnesses, as well as the ages of each, and their opportunities of knowing the fact of which they gave testimony.—It is almost unnecessary to inform the reader, that, on the trial, each witness was examined at once to all the four questions; and that I have separated and arranged their evidence under each different question for the sake of method and perspicuity.

P. 61. 63. (C) I shall take this opportunity of concluding what has occurred to me on a subject, which, as I conceive, merits particular attention, and which I have already had occasion to treat of, in a former note (Case of Peterborough, Note (B) *supra*, vol. iii. p. 130, 131). The right of election in every borough must be considered as depending—on an act of Parliament,—on a subsisting charter,—on usage,—or on a last determination of the House of Commons; and, in speculation, we must consider determinations of the House of Commons as having been formed on evidence

dence of the usage, and containing only a declaration of such usage. But it is a great question, whether an usage sufficient to establish a right of election, must, like what is necessary to establish other prescriptive rights, go beyond the time of legal memory. The Committees which sat in the reigns of Jac. I. and Car. I. seem to have held that a right of election, varying from the common law right (whatever that is), could only be supported by "prescription, and a constant usage beyond all memory." *Vide* Glanv. Reports, and the case of Boston, 8 May, 1628, (cited *supra*, vol. ii. p. 290.) The same doctrine was relied on in many of the other cases contained in these volumes, as well as in this of Cricklade; *vide*, particularly, Case of Poole, (*supra*, vol. ii.) Yet it is most certain, that there are numerous instances of boroughs, where the right of election, although depending neither on statute nor charter, but on usage, is, however, such, as *must* have had its commencement long after the time of legal memory. If the payment of the poor-tax, under the statute of queen Elizabeth, is necessary to entitle a person to vote in a scot and lot borough, (*vide supra*, Case of Peterborough, p. 130. Note (B)), all such boroughs are instances of what has been just asserted. It is not enough to say, that there are no rights of election which depend on the poor-laws, unless such as are settled by determinations of the House, (*supra*, p. 63); for, as has been already observed, those determinations must, in theory, be looked upon to have been meer declarations of prior rights proved by evidence. But the fact is not true. In Taunton, the last determination says nothing of



certificate-men; yet it was agreed on both sides, in the late case of that borough, that such men are disqualified from voting there (*supra*, vol. i. p. 373). This usage cannot be older than the introduction of certificates, by the statute of 8 and 9 Will. III. cap. 30. There is no determination of the House of the right of election in the borough of Ivelchester; yet, there, a legal *settlement*, (by which is clearly meant, a settlement under 13 and 14 Car. II. cap. 12., and the subsequent acts on the subject,) is a necessary qualification (*supra*, vol. iii. p. 154). But what seems to put this matter beyond a doubt, is this: In many cities and towns, which are counties in themselves, the right of election (depending upon usage) is in the freeholders of 40 shillings a year. Is it possible seriously to believe, that this right of election existed before the stat. of 8 Hen. VI. cap. 7. by which a 40 shillings freehold was made the qualification of voters for knights of the shire; or that it had any other origin than the analogy which was supposed to be between such places and proper counties, and a mistaken notion founded thereon, that the statute extended to them. I have shown elsewhere (*infra*, Case of Southampton, Note (H) ), that, in a return of 14 Hen. IV. not many years before the statute of 8 Hen. VI. passed, the members for Bristol, then become a county corporate, are denominated "*milites*." Now, this right of election in counties corporate, which must have had its commencement far within the time of legal memory, is recognized by the legislature itself, in the statute of 19 Geo. II. cap. 28. by which  
the



the provisions of 18 Geo. II. cap. 18. against occasional freeholders in counties at large, are extended to cities and towns which are counties in themselves, and “ *in which persons have a right to vote, for electing members [to serve in Parliament] for and in respect of freehold lands, tenements, or hereditaments, of the yearly value of forty shillings.*”



XXXIII.

THE

C A S E

Of the

TOWN and COUNTY of the TOWN

OF

S O U T H A M P T O N.

G 3

The Committee was chosen on Friday, the 9th of February, and consisted of the following Gentlemen :

James Grenville, jun. Esq;	Members for	Buckingham.
Chairman.		
John Adams, Esq;		Carmarthen.
Richard Benyon, Esq;		Peterborough.
Thomas Dummer, Esq;		Wendover.
Sir John Palmer, Bart.		Leicestershire.
Richard Hopkins, Esq;		Dartmouth.
Edward Phelips, Esq;		Somersetshire.
Afsheton Curzon, Esq;		Clitheroe.
Benjamin Allen, Esq;		Bridgewater.
Anthony Eyre, Esq;		Boroughbridge.
Richard Combe, Esq;		Aldborough, Suffolk.
Isaac Martin Rebow, Esq;		Colchester.
Edward Eliot, Esq;		Cornwall.
NOMINEES.		
<i>Of the Petitioners.</i>		
Sir George Yonge, Bart.		Honiton.
<i>Of the sitting Member.</i>		
John Moreton, Esq;		Wigan.

#### PETITIONERS.

Certain Inhabitants of the Town of Southampton, in the Interest of Lord Charles Montagu.

##### *Sitting Members.*

John Fleming, Esq;

#### COUNSEL

##### *For the Petitioners.*

Mr. Mansfield,                      Mr. Hardinge.

##### *For the sitting Member.*

Mr. Lee,                      Mr. Elliot;

THE  
C A S E  
OF THE  
TOWN, and COUNTY of the TOWN,  
OF  
S O U T H A M P T O N.

ON Saturday, the 10th of February,  
the Committee being met, the petition was read, and was as follows (A):

“ To the Honourable the Commons of  
“ Great Britain in Parliament assembled.

“ The humble petition of many of the  
“ inhabitants of the town of Southampton,  
“ having a right to vote at the election of  
“ burgesses to serve in Parliament for the  
“ said town, on behalf of themselves and  
“ others.

G 4

“ Sheweth,

“ Sheweth,

“ That your petitioners beg leave to  
“ represent to this Honourable House, that  
“ though the regulation and government  
“ of the said town of Southampton is in  
“ the mayor and corporation, yet the right  
“ of election, or choosing of burgesſes to  
“ ſerve in Parliament for the ſaid town, is  
“ veſted in the inhabitants paying ſcot  
“ and lot.

“ That the Honourable Charles Montagu, commonly called Lord Charles Montagu, the Right Hon. Hans Stanley, and John Fleming, Eſq; offered  
“ themſelves candidates at the laſt election  
“ of burgesſes to represent the ſaid town  
“ in Parliament, and Mr. Stanley and Mr. Fleming were returned as duly elected.

“ That though the town of Southampton is governed by a mayor, bailiffs, and burgesſes, and has a ſheriff of its own;  
“ and the ſheriff of Hampſhire, or county of Southampton, has no office to execute within the ſaid town; yet it has  
“ been uſual, time immemorial, for perſons  
“ ſons

“ sons having freeholds within the said  
 “ town to vote, in right of such freeholds,  
 “ for knights of the shire or county at  
 “ large; and one battalion of the militia  
 “ of Hampshire, or county at large, is an-  
 “ nually trained and exercised within the  
 “ town of Southampton, which seems to  
 “ imply, that the said town is still a part  
 “ of the county at large, and not totally  
 “ distinct or independent of the same.

“ That the said Mr. Fleming, when he  
 “ offered himself a candidate, and at the  
 “ time he was returned as a burges to re-  
 “ present the said town in Parliament, was  
 “ sheriff of Hampshire, or the county of  
 “ Southampton; and your petitioners are  
 “ informed, that all sheriffs are disabled  
 “ from being elected, not only by an ancient  
 “ resolution of this Honourable House (1),  
 “ but by the express letter of his Majesty's  
 “ most gracious writ or summons directed  
 “ to the sheriffs; in which your petition-  
 “ ers beg leave to observe are the follow-  
 “ ing remarkable words: “ *Willing, never-*  
 “ *theless, that neither you, nor any other*

(1) *Quære?*

“ *sheriff*



“ *sheriff of this our said kingdom, be in any*  
“ *wise elected.*”

“ Your petitioners, therefore, think them-  
“ selves much aggrieved, and apprehend  
“ that the said election and return (so far  
“ as respects the said Mr. Fleming) is  
“ an undue election and return, and flatter  
“ themselves that the same will be deemed  
“ by this Honourable House null and void ;  
“ and humbly hope that the Honourable  
“ Charles Montagu, commonly called Lord  
“ Charles Montagu, will be permitted to  
“ sit in this Honourable House, as one of  
“ the burgeses for the said town of South-  
“ ampton, in the room of the said Mr.  
“ Fleming.

“ Your petitioners, therefore, humbly  
“ pray, that they may be heard by their  
“ counsel, and have such other relief in  
“ the premises as this Honourable House  
“ shall think proper.”

It was admitted that Mr. Fleming was  
sheriff of Hampshire at the time of his  
election ; that the town of Southampton is  
a county

a county in itself; that there is a sheriff of the town to whom the writ of election is sent, and who, in consequence of the writ, issues his precept to the mayor and two bailiffs, they being the returning officers, according to the following resolution of the House.

3 April, 1735, Resolved, " That the  
 " mayor and bailiffs of the town, and  
 " county of the town, of Southampton,  
 " are the returning officers (B) for the said  
 " town and county (1)."

✎ The counsel for the petitioners informed the Committee, that they did not mean to raise any question concerning the right of election, and that they admitted that the majority of legal votes was in favour of Mr. Fleming.

The last determination, therefore, was not read.—As, however, according to what was held, in the case of Petersfield (2), to be the

(1) Journ. vol. xxii. p. 445. col. 1. p. 449. col. 1.

(2) *Supra*, vol. iii. p. 6.

regular

regular practice, *that* ought to have been done, I have here inserted it.

17 March, 1695-6, Resolved, "That the  
" out-living burgesſes, as well as the bur-  
" geſſes inhabitants, and other inhabitants,  
" paying ſcot and lot, have a right to vote  
" for electing members to ſerve in Parlia-  
" ment for the town, and county of the  
" town, of Southampton (1)."

The counſel for the petitioners con-  
tended,

That Mr. Fleming, having been ſheriff  
for Hampſhire at the time of the election,  
was ineligible to ſerve in Parliament for the  
town of Southampton; and that, under  
the circumſtances of the caſe, the votes  
given for him were thrown away, and that  
Lord Charles Montagu ought to be declared  
duly elected.

✍ The reader muſt have obſerved al-  
ready, that this caſe differs from that of

(1) Journ. vol. xi. p. 519. col. 1.

Abingdon, and, as the event was also different, and the point concerning the eligibility of sheriffs was, on this occasion, very thoroughly investigated, I think it necessary to state the arguments used on both sides of the question at some length, although they were, in general, built on the same authorities and precedents, with those reported in the history of the case of Abingdon.

#### COUNSEL for the petitioners.

The clause of "*Nolumus*," in the parliamentary writ, several statutes, and every precedent, from the reign of Edw. I. to the present time, concur in proving and establishing it to be law, that persons holding the office of sheriff, are ineligible to serve in Parliament.

As to the writ, there certainly cannot be such strong and weighty evidence of what the law is, and *this*, in the most explicit terms, excludes *all* sheriffs. The case of Payton (1) shows, that they were

(1) *Supra*, vol. i. p. 433.

under-

understood to be ineligible, in the reign of Edward I. The petition of the Commons, in the 13 Edw. III. proves, that their sitting in Parliament, was then considered as an abuse (C) (1). In those days, the sheriff was the servant and instrument of the Crown in oppressing the subject. It was on that account that the Commons were so displeased that any who held that office, should be elected to serve in Parliament; and from the petition just mentioned it has been well observed (2) that a presumption arises, that what has been called an *ordinance* in the 46 of Edw. III. had the concurrence of all the branches of the legislature, and was therefore a *statute*. It is indeed denominated an ordinance, but it appears, that it was *accorded and assented to in full Parliament* (3); and many old laws, which are unquestionably complete statutes, are called

(1) *Supra*, vol. i. p. 423.

(2) *Ibid.* Note (B). p. 450.

(3) Appendix to Ruffhead's Edition of the Statutes, p. xliii.



ordinances (1). Perhaps, an ordinance, in full Parliament, differed from what was peculiarly termed a *statute*, in this respect, that the former was a name for a declaratory, the other, for an enacting law.

It would be tedious to mention the variety of ancient acts of Parliament, where the word "*ordains*" is the only term employed in the enacting part, and this before, during, and after, the reign of Edward III. The stat. of 4 Hen. IV. cap. 5, (which will be afterwards cited) begins thus: "Item, it is *ordained* and "affented." The counsel on the other side will not deny, that 7 Hen. IV. cap. 15, is an act of Parliament, because it is considered by Lord Coke as having repealed that of 46 Edw. III. Yet, the statute of 6 Hen. 6. cap. 4. recites, that, by that act of 7 Hen. 4. "it was *ordained* "and established," &c.—23 Hen. VI. cap. 9. is, in the body of the act, called,

(1) *Vide* Preface to Ruffhead's Edition of the Statutes, p. xii, xiii. for the supposed difference between statutes and ordinances.

" This



“ This *ordinance*.”—Nay, in one of the petitions of 46 Edw. III. which Sir Edward Coke, in the preface to his 3d Report, cites as an act of Parliament, the prayer is, “ Pleise *ordeiner* per *estab-  
“ tute*.” What stronger evidence can be necessary to show, that, at that time, “ *or-  
“ dinance*” and “ *statute*” were convertible terms? Even so late as 23 Hen. VIII. cap. 5. the enacting words are, “ *ordain-  
“ ed*, established, and enacted;” and in 18 Eliz. cap. 10. “ Be it explained, *or-  
“ dained*, and enacted.”——

Sir Edward Coke gives it as his opinion, that, if the act of 46 Edw. III. *had* been a statute passed with the authority of Parliament, “ the same had been abrogated by  
“ 5 Ric. II. stat. 2. cap. 4. (D), and  
“ 7 Hen. IV. cap. 15;” which, he says, are general laws, without any exception (1). But the truth is, those two statutes could not operate a repeal of disqualifications, created by previous acts of Parliament, or

(1) 4 Inst. p. 48.

existing at common law. *That* could only be done by express words, and there are none which can have that effect in either of them. Indeed, when it is considered, that Sir Edward Coke made his observations on the 46 Edw. III. with a view to his own case, little reliance will be had on his opinion, as it is well known, that in political questions, especially where he himself was concerned, that great lawyer was but too apt to employ the eminent knowledge he possessed in the laws of his country, to pervert them to his own purposes, and those of his party.

About the 46th year of Edw. III. agreeably to the law then established, the clause of "*Nolumus*" was introduced into the writ, and, except with some interruptions during that reign and the next and at the beginning of the reign of Henry IV, it has been continued invariably ever since. It was probably in compliance with the repeated and earnest remonstrances of the Commons, that this step was taken; because, it was reasonable to

suppose, that a constant check was thereby secured, which would prevent any future attempts to infringe this part of the law.

The reluctance with which that arbitrary prince (Edw. III.) yielded to the desires of the people, on this head, appears from his attempt to suppress, so soon after it was framed, this prohibitory clause; an attempt, which, both he himself and his grandsons, Richard II. and Henry IV. (at least, till the fourth year of his reign) carried into execution.

But, although the reason why the Commons, at that æra, were so zealous to exclude sheriffs from Parliament, was, probably, the influence which the Crown had over them; yet, the legal ground of their ineligibility was, that, from the nature of their office, and the duties annexed to it, many of which can only be performed by their personal attendance in their county, they were bound to constant residence there. This is particularly specified in the act of 46 Edw. III. ; and, in the 4th year of Hen.

Hen. IV. a particular statute was made, by which it is “*ordained* and assented, “ that every sheriff of England *shall* “ *abide* (1), *in proper person*, in his baili- “ wick, for the time that he shall be such “ officer (2);—and that the said sheriff be “ sworn, from time to time, to do the “ same in special, amongst other articles “ comprised in the oath of the sheriff (3).”

In consequence of this statute, the following clause makes part of the oath of office, taken by every sheriff, “ Ye shall be “ dwelling, in your own proper person, “ within your bailiwick, for the time ye “ shall be in the same office (except ye be “ otherwise licenced by the king) (4) (E)”. Being thus bound by oath to constant residence, a sheriff could not possibly, without perjury, leave his county to attend in Parliament; and, as the duration of a

(1) The original words, so translated, are, “ Soit *demurrant en propre persone.*”

(2) 4 Hen. IV. *cap.* 5.

(3) *Ibid.*

(4) Dalt. Office of Sheriff, p. 10.

shrievalty, in early times, generally surpassed that of a Parliament, the oath, in itself, amounted to an absolute incapacitation.

From what has been said hitherto, it is very clear that, formerly, the offices of sheriff and member of Parliament were incompatible, and that, by law, a sheriff was ineligible. But, if such was the law, nothing but a positive statute can since have altered it; and whatever *modern* reasons of expediency may now be discovered against the ineligibility of sheriffs, however, it may be alledged, that the act of 4 Hen. IV, and the clause thereby introduced into the sheriff's oath, are now seldom enforced or complied with (E), still it must be admitted, that those reasons, though they may influence the legislature to *change*, cannot, and ought not, to induce a court of justice to *over-rule*, the actual subsisting law of the land.

So little doubt was, for a long course of years, entertained on this subject, that no instances can be found of any sheriff's sitting

ting in Parliament from the time of Edw. III. down to the reigns of Hen. VIII. and Queen Elizabeth; and it appears that those which happened in their reigns were cases of persons who were made sheriffs after they had been chosen to Parliament (1). Now, to be sure, neither the words of the act of 49 Edw. III. nor those of the "*Nolumus*" extend to them, though the intention must have been to exclude all sheriffs.

As to the distinction suggested by Sir Simon D'Ewes, and which has served very much to embarrass this matter, *viz.* that the prohibition only affects sheriffs chosen within their own bailiwicks, there is not the smallest foundation for it, either in the statute and writ, or in reason and precedent. On the contrary, every precedent where the point has been brought to a decision, is, without one exception, from the

(1) Littleton's Rep. p. 329. But Sir G. Covert was first appointed sheriff, and then elected to Parliament.



case of Sir A. Nowell, down to that of Abingdon, against the eligibility of sheriffs in general. The history of the case of Sir Edward Coke is well known. He, together with Sir Thomas Wentworth, Sir Francis Seymour, Sir Robert Philips, Sir Guy Palmes, Mr. Edward Alford, and Sir William Fleetwood, being able and distinguished opposers of the arbitrary attempts of the Crown, were appointed sheriffs, with the express intention of disqualifying them from being chosen to Parliament (1). The motive here was highly tyrannical, yet, so strong was the persuasion, in those days, of the general ineligibility of sheriffs, that, of the seven, only Sir Edward Coke (who, according to the expression used at the time, was made the scape-goat) attempted to come into Parliament. And what was the consequence of his election? It was complained of, and, though there was not time for a decision, he was

(1) Strafford's Letters, vol. ii. p. 29.

treated by the House as merely a member *de facto*, and abstained from attending (1).

The point had been solemnly determined a few years before, in the case of Sir George Selby (2), and all the subsequent cases, as those of Long, Fletcher, and that of Abingdon, have confirmed the doctrine, which now cannot be overturned by any thing but an act of Parliament.

#### COUNSEL for the sitting member.

It is not, neither can it be, denied that a writ, merely as such, has no compulsive force, and that it must owe its validity to positive law. The prohibitory clause, therefore, in the writ of election, if it has the force ascribed to it, must derive it either from the common law, or from an act of Parliament. The counsel for the petitioners have taken both these grounds, and, in the first place, they contend, that it is founded

(1) Littleton's Rep. p. 340.

(2) *Supra*, vol. ii. p. 447, to 449.

on what they call a statute of 46 Edw. III. That this, however, is not a statute must be inferred, both from the authority of the greatest lawyers who have treated on the subject, and from an examination of the act itself. Sir Edward Coke lays it down, in two different passages of his Fourth Institute, that it is not a statute (1). Lord Keeper Littleton is of the same opinion, in his report of Long's case in the Star-chamber, 5 Car. I. and he particularly proves the difference between ordinances and statutes from several instances, where, by subsequent laws, what were at first only ordinances, were afterwards made statutes. 1 Ric. II. cap 5. 2 Ric. II. cap. 7. 34 Edw. I. 28 Edw. III. 11 and 16, and 3 Ric. II. (2) Sir Bulstrode White-

(1) 4 Inst. p. 10. p. 48.

(2) *Vide* Littlet. Rep. p. 328, 329. I cannot find the passages he refers to in 34 Edw. I. and 28 Edw. III. 11. and 16, and 3 Ric. II., in the statute-book. Instead of 28 Edw. III. 11 and 16, we probably should read 28 Edw. III. cap. 13, as that statute is in point to the present purpose. *Vide* Whitel. Comm. vol. ii. p 368.

lock

lock tells us, that, in Sir Edward Coke's case, it seemed to be agreed that the ordinance of 46 Edw. III. was not made on the petition of the Commons, but was an act of the King and Lords only, and that it therefore hath not the force of law, and he adds, "that it was left as a clear truth, that neither this, nor any other ordinance, is the same thing with an act of Parliament, or has the same force of law in it (1)."

This distinguished parliamentary lawyer also mentions instances where ordinances have, by succeeding laws, been made statutes. It is said, Sir Edward Coke's opinion on this subject, is to be mistrusted, because he was, in some measure, speaking of his own cause; but this objection will not lie to the sentiments of the other two, who had no particular interest in the question (F).

If we now proceed to examine the ordinance itself, we shall find it destitute of

(1) Whitelock, vol. ii. p. 359. 368.

the essentials of an act of Parliament. It is not entered on the statute-roll (1), and, in the Parliament-roll, it is manifestly distinguished from the petitions and answers, which was the form of acts of Parliament at that time; nor is there any appearance of its having had the concurrence of the three estates; and that is, and always was, necessary to every statute (2).

If this had been an act of Parliament, the prohibition against lawyers contained in it would be equally valid with that against sheriffs; but, since the *Parliamentum indoctum* of Hen. IV. to this day, it never has been contended, that lawyers are incapable of sitting in the House of Commons. The order in the reign of Jac. I. that the Attorney General should never sit in the House, as well as the proceedings on that occasion, show that it was the sense of the House itself that lawyers in general might be legally chosen; otherwise such a special order against

(1) Ruffh. Append. p. 43. Note (a).

(2) Prince's Case, 8 Rep. p. 20.

the Attorney General, would have been unnecessary (1).

If, after all, it should, for argument's sake, be admitted, that the ordinance in question was a statute, we have still the concurring opinions of Sir Edward Coke and Littleton, that it was repealed by the two statutes of 5 Rich. II. and 7 Hen. IV. (2). Nay, if it were even to be granted for a moment, that it is not only a statute, but a statute still in force, it yet would not affect the present case ; for the prohibition it contains is only against the election of sheriffs to be *knights of the shire*. Although Southampton is certainly a county in itself, it will not be contended, that its members are knights of the shire. They are not chosen by 40 shillings freeholders, as all knights of the shire are, and have been, ever since the reign of Hen. VI. They are expressly called, "*Burgeffes*," both in the writ to the sheriff, and in the precept which he issues to the returning officer, for

(1) *Supra*, vol. i. Note (1), p. 453.

(2) Co. 4. Inst. p. 10. 48. Littleton Rep. p. 329.

their



their election ; and, in this respect, namely, of being chosen by *precept*, they resemble the representatives of common boroughs more than the members for other counties corporate do.

If we now take into consideration the arguments brought to prove, that sheriffs were ineligible at common law, it will be found to be a task of no great difficulty to refute them. The case of Warwickshire, in the reign of Edward I. is relied on. But the writs on that occasion, and all the proceedings attending them, were, according to our present ideas of the constitution, so anomalous and illegal, that no legal inferences can be drawn from them. The Parliament summoned by those writs was to be chosen not by the people, but the King. The return made by Payton, was the act of the sheriff himself, who was desirous of being excused from serving in what was, in those days, an expensive and burthen some office.—After all, that case can only be a precedent against the election of sheriffs for counties.

If

If the ineligibility of sheriffs had existed at common law, why is there no instance of the “*Nolumus*” before the ordinance of Edw. III. ? There is something ambiguous in an expression of Whitelock, which might, on a cursory reading, seem to imply, that such a clause was inserted in the writs immediately after the petition of 13 Edw. III. (C); (and even that would not show the disqualification to have been part of the common law;) but, in truth, he does not mean any such thing; and Littleton expressly tells us, that the first instance of a writ containing the “*Nolumus*,” was in 47 Edw. III.

The history of the clause of “*Nolumus*” is given us, both by Littleton and Whitelock. In the 47 Edw. III. as has been just mentioned, it was first introduced, and then it was omitted in the writs to the Cinque Ports. 49 Edw. III. it is in all the writs, except that for Bristol (H). 50 Edw. III. in all. 1 Rich. II. omitted again in the writ

writ for Bristol. After 1 Rich. II. it was inserted in that writ as well as in all the others, and so continued from the 1st to the 12th year of his reign. Before 12 Rich. II. it contained some words not now employed, which were in that year laid aside, the form then being exactly the same as at this day. So it continued till 5 Hen. IV. when it was made to exclude lawyers as well as sheriffs, the Parliament then chosen having been on that account stigmatized by the lawyers, with the nick-name of "*Parliamentum indoctum*," or, "The lack-learning Parliament." In 7 Hen. IV. in consequence of a petition of the Commons, it was enacted, "That elections should be proceeded to *freely and indifferently*, notwithstanding any *request* or *commandment* to the contrary (1)." Accordingly, the "*Nolumus*" was omitted in the writs the very next year, which shows clearly, that it was that prohibition which was particularly meant by the words "*request*" and

(1) 7 Hen. IV. cap. 15.

“ *commandment.*” It was not resumed till 14 Hen. IV. From that time, till the present, it has been always inserted, though with some exceptions as to the Cinque Ports and Calais, which had a writ to return members in the reign of Hen. VIII. (2). As then it is evident, that the “ *Nolumus*” was laid aside in 8 Hen. IV. in consequence of the statute of the preceding year, we must infer, that it became from thenceforward, at least, illegal; and this being so, it necessarily follows, that it never could be legally resumed; or, being *de facto* resumed, could be of no force without a subsequent statute for that purpose. Here Lord Coke’s doctrine applies with great weight: “ If,” says he, “ original writs, at the common law, can receive no alteration or addition, but by act of Parliament, *a multo fortiori*, the writs for the summons of the highest court of Parliament, can receive no alteration or addition, but by

(1) *Vide* Whitel. vol. ii. p. 357. 359; and Littl. Rep. 328, with the rolls of Parliament there cited.

“ act of Parliament (1)” No statute can be produced to authorize the revival of the “ *Nolumus*” in 14 Hen. IV. and the continuance of it ever since. It is therefore illegal, and of no force.—The manner in which it came, in fact, to be renewed was, most probably, as Littleton has conjectured, that the clerk who was to make out the writs, having an old precedent before him, containing the prohibitory clause, copied the whole, *verbatim* (2). His error has been transmitted to our time, in consequence of the established routine of office.

The counsel for the petitioners, after endeavouring to prove that the ineligibility of sheriffs is part both of the ancient common and statute law, have recourse, in order to confirm their doctrine, to topics of convenience and expediency drawn from early times. The danger of partiality and influence, which was so much insisted on in the case of Abingdon, does not apply here; because the sitting member did not return himself, but was elected for a county entirely independent

(1) 4 Inst. p. 10.

(2) Littl. Rep. p. 329.

of his bailiwick. It is said that it is the duty of a sheriff to reside in his county during the whole time of his shrievalty, and that, consequently, the offices of a sheriff and member of Parliament are incompatible;—that a sheriff is, by his oath, founded on a statute of Hen. IV. obliged to constant residence. To this it may be answered, that the oath is never taken (E), and that, if the two offices were by law incompatible, a person who, being in Parliament, should be made sheriff, must vacate his seat; but it is admitted, and can be proved by a thousand instances (1), that persons already members, having been appointed sheriffs, have continued to sit, and have had leave given them by the House to go into the country to attend their duty. The argument, that a sheriff cannot do the duties of his office, and also attend in the House of Commons, is of very little weight as things are now established, since he is only sheriff for one seventh part of the duration of a Parliament. Indeed, the same ar-

(1) *Vide infra.*



gument bears much more strongly against the eligibility of officers in the army during a war, and of ministers in foreign countries: Yet it will not be maintained, that either officers or ambassadors are ineligible. Surely, if any arguments *ab inconvenienti* are to weigh in this question, the danger to the constitution, if the King were to have it in his power to exclude fifty-two of the principal friends to the interests of the people from the House of Commons, by appointing them sheriffs on the eve of a general election, is of much more serious consideration, than any disadvantage that can be suggested as a consequence of the eligibility of sheriffs (I).

It now only remains to consider the series of cases, and see how far they affect the general doctrine, or the particular question now before the Committee.—The clearest method of doing this will be to arrange them in the order of time as they happened.

8 Hen. IV. Sir John de Bartly's eldest son was knight of the shire, and sheriff at the

the same time, but had been appointed sheriff *after* his election to Parliament (1).

34 and 35 Hen. VIII. Sir Edward North was, at one and the same time, knight of the shire and sheriff for the county of Cambridge. This is proved by a very curious statute of 34 and 35 Hen. VIII. cap. 24. (K) (2).

27 Eliz. 4 Dec. 1584. "Leave to Edward Leigh, Esq; knight for the county of Stafford, and, *since that time*, chosen sheriff for that county, to absent himself in and about his necessary charge and service in the office of sheriffwick (3)."

27 Eliz. 23 Feb. 1584-5. "Sir Edward Dymock, *being* sheriff of the county of Lincoln, was licensed by the House to depart into the country for the service of her Majesty in the charge of his said office (4) (L)."

(1) Littlet. Rep. p. 329. from 8 Hen. IV. *Rot. claus.* M. 6. and M. 22.

(2) Litt. *loc. cit.*

(3) D'Ewes, p. 335. col. 2.

(4) *Idem*, p. 355. col. 1.

31 Eliz. 1588-9. “ — Saintpole, Esq;  
 “ one of the knights in Parliament for the  
 “ county of Lincoln, being also sheriff for  
 “ the said county of Lincoln at this pre-  
 “ sent time, had licence by the House to  
 “ depart into the country about the at-  
 “ tendance of his said office of sheriff-  
 “ wick (1) (M).”

35 Eliz. 1592. Sir Walter Covert, being  
 first sheriff of Suffex, was returned burges  
 for Petersfield in Hampshire (2).—This is  
 exactly in point to the present case (N).

In the same year Sir George Nin was  
 sheriff and knight of the shire (3) (N).

39 Eliz. 1597. Bernard Greenvill, high  
 sheriff of Cornwall, was member for Bod-  
 min in that county (4).

43 Eliz. 1601. Sir Andrew Nowell, be-  
 ing sheriff of Rutlandshire, was chosen, and  
*returned himself*, one of the members for  
 that county. This being moved in the  
 House, it was unanimously resolved, (4 Nov.

(1) D'Ewes, p. 436. col. 2.

(2) Littl. Rep. p. 329.

(3) *Ibid.*

(4) Br. Will. Not. Parl. vol. ii. p. 64.

Nov. 1601.) that the return was void, and that a new warrant should be sent forth (1). —Both D'Ewes and Littleton, observing on this case, consider the principle of the determination to have been the absurdity of a man's returning himself, and, on that ground, D'Ewes reconciles it with the case of Saintpole. The motion and resolution, as appears from D'Ewes, were only concerning the *return*; and Littleton emphatically observes, that nothing was said of the *election* (2). D'Ewes indeed conjectures, also, that Saintpole was chosen to Parliament before he was made sheriff, but he only gives this as matter of conjecture (M).

43 Eliz. 2 Dec. 1601. " Peter Freche-  
 " ville, Esq; returned into this present Par-  
 " liament for one of the knights for the  
 " county of Derby, for that he is chosen  
 " sheriff of the county, and other his ne-  
 " cessary affairs, is licensed by Mr. Speaker  
 " to depart home (3)."

(1) D'Ewes, p. 624, 625.

(2) Litt. *loc. cit.*

(3) D'Ewes, p. 665. col. 1.

12 Jac. I. 1614. Sir George Selby, *hereditary* sheriff of the county of Durham, was returned knight of the shire for Northumberland. Upon a petition against him, the House determined that he was ineligible, and a new writ was ordered (1).—This is the case of a sheriff of one *county*, being holden ineligible for another county. It happened in bad times, is the only decision of the sort, and was contradicted by that of Sir Edward Coke, which happened a few years afterwards.

1 Car. I. 1625-6. Sir Edward Coke, having been appointed sheriff for the purposes mentioned by the counsel on the other side, was, notwithstanding, chosen and returned one of the knights of the shire for Norfolk; and although, at the desire of the King that he should be removed, the matter was referred to the Committee of privileges; yet, when they made their report, they delivered no opinion against his

(1) Journ. vol. i. p. 457. col. 2. p. 458. col. 1. Whitcl. vol. ii. p. 369.

eligibility (1) (O); and there is an order of the House that he should have privilege of Parliament in a suit in Chancery on the 9th of June following (2), only five days before the dissolution of the Parliament; which shews that he was considered, to the last, as a member. As to the words "*de facto*" in the entry, they probably were merely employed with a view not to irritate the King. In short, this case of Sir Edward Coke is equal to a determination, and is considered as such, not only in the Fourth Institute, but by Whitelock, Littleton, and Mr. Justice Blackstone (3).

3 Car. I. 1628. Walter Longe was sheriff of Wiltshire when he was returned, and sat, for the city of Bath in Somersetshire (4); but, an information being filed against him in the Star-chamber, for attending in Parliament and not residing in his county, contrary to his oath, and the statute

(1) Journ. vol. i. p. 825. col. 1. 27 Feb. 1625-6.

(2) *Ibid.* p. 869. col. 2.

(3) Blackst. Comm. vol. i. p. 175. 4to Ed.

(4) Littl. Rep. p. 326. Br. Will. vol. i. p. 223.



of 4 Hen. IV. (1), he was, by a sentence of that court, fined 2000 merks, and ordered to be imprisoned in the Tower, during the King's pleasure, and until he should make his humble acknowledgment and submission in the court of Star-chamber, and to the King (2). This case is cited as an authority on the other side. But, on a moment's consideration, it will be seen to be nothing less. It appears, from a great variety of authorities; that Longe sat during all the short Parliament of 3 Car. I. without any objection being made in the House of Commons;—the only judicature entitled to judge of the legality of his election; and the House afterwards showed that they considered the proceedings against him, in the Star-chamber, as oppressive, and against law, by the following resolution.

(1) *Supra*, p. 99.

(2) *Vide* Parl. Hist. vol. viii. p. 381. where the information and judgment are set forth at large.

18 Jan.

18 Jan. 1646-7. Resolved, " That Mr.  
 " Walter Longe shall have the sum of  
 " 5000 *l.* paid unto him, for the damages,  
 " sufferings, losses, and imprisonments,  
 " sustained and undergone by him, for his  
 " service done to the Commonwealth, in  
 " the Parliament of *Tertio Caroli* (1)."

We may, therefore, with greater justice infer, when all the circumstances relative to Longe are taken together, that his case strongly favours the eligibility of sheriffs for boroughs out of their counties; although it must be owned that it does not furnish a *direct* parliamentary decision one way or the other.

In the debate on Hatcher's case, it was mentioned by Mr. Powle, that Serjeant Croke's brother had served in the long Parliament for a borough in Oxfordshire, when sheriff of that county; and in this he was not contradicted by the Serjeant, who was present, and spoke in the debate, against Mr. Hatcher (2) (P).

(1) Journ. vol. v. p. 55. col. 2.

(2) A. Grey's Debates, vol. iv. p. 316.

1660. Mr. Oakley, having been made sheriff of Shropshire, during the Parliament of the Interregnum, was chosen for Bishop's-Castle, in his own county, and sat without dispute (1).

1677. Mr. Hatcher, sheriff of Lincolnshire, on a vacancy for the borough of Stamford, in that county, offered himself a candidate, and had a majority of votes; but, probably from an idea that a sheriff could not return himself, he made a return of H. Nowell, Esq; the other candidate, and then presented a petition to the Committee of elections, desiring to be received to his seat, in the room of Nowell. This occasioned a debate in the House, and, on the question, the petition was rejected, because he was thought to be concluded by his own return of another person (2). This is the great case, which was so much relied on, last year, in the Abingdon cause; but, though it might be in point on

(1) Grey, *loc. cit.* p. 317. Br. Will. Not. Parl. vol. i. p. 292.

(2) Journ. vol. ix. p. 407. col. 1.

*that,*

*that*, it certainly is not on the present, occasion, as will be shewn immediately.

1710. 5 Dec. Mr. Harpur, sheriff of Derbyshire, having been returned for the borough of Derby, a petition was presented, complaining of his election, on the ground of the incapacity of sheriffs (1). The petition was afterwards withdrawn (2).

1727. Charles Bathurst, Esq; and Sir M. Wyvill, being returned members for Richmond in Yorkshire, a petition was presented against them, by the two unsuccessful candidates; in which it was mentioned, that Bathurst was sheriff. Yet, though the two petitioners were declared duly elected, the determination went entirely on a point concerning the right of election, and there was no question made as to the eligibility of a sheriff (3).

(1) Journ. vol. xvi. p. 419. col. 1.

(2) Same vol. 19 Feb. 1710-11. p. 507. col. 1.

(3) Journ. vol. xxi. p. 25, 26. 72. col. 2. 78. col. 1, 2. 86. col. 1.

1766. On a vacancy for the city of Wells, in the county of Somerset, occasioned by the Lord Digby's being called up to the House of Peers (1), Mr. Child and Mr. Peter Taylor, senior, were candidates. There were two returns; one by the senior master of the borough, to whom the sheriff (who was Mr. Taylor's son) had delivered the precept. By this, Taylor was returned. The mayor, who was the legal returning officer, made a return in favour of Mr. Child, and tendered it to the sheriff, who refused to receive it. On this, the mayor petitioned the House (2), and *his* return was ordered to be filed in place of the other, with leave, however, to Mr. Taylor, and the electors, to complain of the election, within a fortnight (3). Accordingly, two petitions were presented, complaining of the election of Mr. Child, and

(1) Journ. vol. xxx. p. 439. 17 Dec. 1765.

(2) Same vol. p. 456. 15 Jan. 1766.

(3) Same vol. p. 466. 20 Jan. 1766. *Vide supra*, vol. i. Case of Morpeth, p. 153.

in both it was *especially* alleged, that Mr. Child had been declared duly elected, contrary to the tenor of the writ, “ *being then the acknowledged sheriff of Warwickshire* (1).” The general point was, on that occasion, very fully argued, by the counsel for Mr. Taylor; but they found the opinion of the House so very clear against them, that it was thought advisable to withdraw the petitions, before there was any express decision (2) (Q).

1775. The last case happened last year, *viz.* The Case of Abingdon, when Mr. Mayor, sheriff of Berkshire, being chosen and returned for Abingdon, a borough within his own county, the Committee determined, that his election was void (3).

The cases which have been just mentioned may all be reduced under five different heads, or classes of sheriffs; *viz.*

(1) Journ. vol. xxx. p. 506. 31 Jan. 1766.

(2) Same vol. p. 601. 24 Feb. 1766.

(3) *Supra*, vol. i. p. 447.



1. Persons made sheriffs *after* they were returned to Parliament. 2. Sheriffs chosen knights for their *own* shires. 3. Sheriffs chosen for boroughs *within* their jurisdiction. 4. Sheriffs of *one* county chosen for *another*. 5. Sheriffs chosen for boroughs *without* their jurisdiction.

Now, as to the first class, as it is admitted, and, indeed, irresistibly proved, that *they* are capable of continuing to sit in Parliament, it follows, that the two offices are compatible; and therefore all reasoning to the contrary is of no avail. Sir A. Nowell's case is a decision against the eligibility of sheriffs to represent their *own* counties, (which is the 2d class) and there is no positive decision the other way. The cases of Mr. Hatcher, and of Abingdon, are perhaps direct determinations against the eligibility of persons in the 3d class; and, although there are, among the foregoing instances, several, of persons who were in this predicament, and continued to sit, even after being petitioned against, yet, seeing there is no positive determination in their favour, we may  
allow

allow it to be law, that sheriffs cannot be chosen for boroughs within their jurisdiction. But the ineligibility of the two last-mentioned classes, (*viz.* 2nd and 3d) may, and seems to, rest on grounds of general law, independent of the “*Nolumus*” in the writ, and the ordinance of 46 Edw. III. *viz.* the incongruity of a person’s returning himself, and the inexpediency of a sheriff’s being capable of representing his own county. The 4th class *are* eligible, according to Sir Edward Coke’s case. If the case of Sir George Selby is to be the rule, they are *not*; and that case, to be sure, is consonant to the ordinance. But the present sitting member falls under the 5th class, and there is not to be found, either among the precedents which have been stated, or in any author, an instance where a sheriff, chosen for a borough *out* of his jurisdiction, has been determined, or held, to be unduly elected, or incapable of retaining his seat. The ordinance of 46 Edw. III. if we were to allow it all the weight of an

act of Parliament, does not affect this class; and, although there is no positive decision in their favour, yet the cases where they have been allowed to sit, when complained of, have, if opposed to nothing, the authority of decision. The case of Wells, particularly, may be reckoned an adjudged case, since (as was hinted before) it is well known, that the objection to Mr. Child was very strongly argued at the bar, and was only given up because the sense of the House was manifestly against it.

As, therefore, it is the opinion of the best parliamentary lawyers, and of such as could have no interest in the question, particularly a late learned and elegant author (1), that sheriffs *are* eligible without their jurisdictions;—As the 46 Edw. III. the only possible legal foundation for the “*Nolumus*,” (which, where it exceeds the prohibition in that ordinance, can have no

(1) Blackst. Comm. vol. i. p. 175. 4to Ed.

claim

claim to any authority) extends only to members for counties;—As there is no case where a sheriff, chosen a burges out of his own county, has, on that account, been removed from the House;—As there are, on the contrary, many instances where sheriffs so elected have sat, even though objected to;—And, as all disabilities are to be construed strictly;—The Committee, for all those reasons, and their force is much increased by the danger of augmenting the influence of the Crown, will not think that they can, or ought to, deprive the present sitting member of his seat as a burges for Southampton, because, at the time of his election, he was sheriff of the distinct and independent county of Hampshire.

COUNSEL for the petitioners, in reply.

The general point contended for on the part of the petitioners is, “ That a sheriff  
 “ is not eligible for any county or bo-  
 “ rough;” and, notwithstanding what has  
 VOL. IV. K been

been urged on the other side, this doctrine, on a fair review of the arguments arising from the writ, from the statutes, from the authority of writers on the subject, and from the cases, must stand its ground, and ought to be confirmed by the determination in this cause.

The writ does not *make* the law.—Agreed. But a clause, which has existed in the writ almost ever since the Parliament itself has existed in its present form, is certainly the most satisfactory evidence *of* the law. The petition in 13 Edw. III. proves that the “*Nolumus*” does not depend on the act of the 46th of that King; and that it derived its origin from the people (C). Its authority is confirmed by 4 Hen. IV. cap. 5., which statute remains in force to this day. It has been already observed that Parliaments, in those days, were generally of much shorter duration than the annual office of sheriff. Consequently, at that period, there was the utmost propriety in excluding from Parliament persons who, without breach

of their oaths (E), could never once take their seats.

If we were to admit that the "*Nolumus*" was first introduced by the act of 46 Edw. III. such admission would not derogate from its authority, since *that* is most undoubtedly a statute. It has been shown that nothing is so common in the old acts of Parliament as to call statutes "*ordinances*." The very word used in the writ itself for "enact" is "*ordinare*." Prynne clearly refutes Lord Coke's distinction, and mentions above an hundred printed statutes which use the names of "acts" and "ordinances" indiscriminately, or else couple the words "act" and "ordinance" together, as synonymous expressions. He particularly says that this of 46 Edw. III. "was an *act* and ordinance of Parliament, which are both one in law and obligation (1)"

(1) Pryn. Animadv. p. 13.



The words of 46 Edw. III. show that the reason for incapacitating sheriffs was general, and applied equally to those chosen for boroughs, as well as counties, or out of, as well as in, their jurisdiction; and the "*Nolumus*" explicitly prohibits the election of any sheriff whatsoever. If the reason of the incapacity of a sheriff to serve for his own county had only been, that a man must not return himself, why did not the prohibition run, "*Nolumus autem quod tu aliquammodo sis electus*," without the addition of "*nec aliquis alius vicecomes dicti regni nostri*."

But it is said that, supposing 46 Edw. III. to be a statute, it is repealed by the two subsequent acts of Ric. II. and Hen. IV. On a perusal, however, of those acts, it is manifest that they have not the smallest relation to the present subject. That of 5 Ric. II. was only made to compel the attendance in Parliament of "every one to whom it belongeth," and to prevent sheriffs, in future, from leaving out of their returns,

6

cities,

cities, and boroughs, entitled, or bound, to send members; an abuse which seems to have been very prevalent about that time (1). The statute of Hen. IV. cap. 15. instead of annulling the prohibition against sheriffs, rather affords a very strong argument in support of it, for it recites "that sheriffs  
 " had made elections contrary to the  
 " form of the writ." The object therefore was to re-establish the authority of the writ. The passage relied on by the counsel for the sitting member is this:  
 " In full county they shall proceed to  
 " the election freely and indifferently,  
 " *notwithstanding any request or com-*  
 " *mandment to the contrary.*" But these words can only be applied to the interference and influence of the servants of the Crown, by means of letters and private solicitation. It is very observable, that the statute in question introduced a new clause into the writ; and that, in order to do so, the legislature thought it necessary to pre-

(1) *Vide supra*, vol. i. p. 70. Note (D).

scribe the very words to be employed. When they were so extremely exact with regard to a new clause, can we suppose that they would not have been equally exact and explicit, if they had meant to enact that a former clause should be expunged ?

When, therefore, it is considered, that Lord Coke, and Whitelock (as far as the latter gives any opinion of his own in favour of the eligibility of sheriffs), mention these two statutes as repealing that of Edw. III. the force of every thing else advanced by them on the subject must be much weakened in the mind of every impartial reasoner. The former, besides his being particularly biased on this question, has fallen into a great number of very palpable mistakes, which have been clearly detected by Prynne, in his animadversions on the Fourth Institute (1). After all, even *he* does not directly maintain that sheriffs are eligible. He only states, that he himself was allowed privilege, and leaves

(1) P. 12, 13.

the reader to draw the inference. White-lock gives us the arguments on both sides, made use of in Coke's case; and observes, at the conclusion, "That the prohibition has been long continued, and generally observed (1)."

The arguments of Littleton (F) are frivolous and fallacious. He does not seem to have known of the petition of 13 Edw. III. (C). His supposition that the "*Nolumus*" got again into the writ by the blunder of the clerk, is a strange one indeed; for who can believe, that such an important clause could have passed so long unnoticed, if its being in the writ rested on no better foundation, or that this circumstance would have escaped the vigilance and penetration of those able patriots who sat in the Committee of elections on Sir Edward Coke's case?

It is evident that Sir William Blackstone has not considered this subject with

(1) Whitel. vol. ii. p. 359.

his usual accuracy. He mentions it in a very general cursory manner, and the authorities he cites, are Coke and Whitelock, who have been sufficiently refuted.

Every *decided* case confirms the authority of the "*Nolumus*." It is unnecessary to observe upon instances where there was no petition or complaint; for although, perhaps, a disability to be chosen *may* be taken up in the House (1) without any petition, yet nothing can be inferred in favour of sheriffs, because the objection to their eligibility has, in some instances, been overlooked. Minors are by law ineligible, and incapable of sitting in Parliament. Yet how many examples are there, in our own days, where persons under age have been returned, and have sat in the House of Commons, without objection? The cases cited, of sheriffs to whom leave has been given to suspend their attendance in Parliament, in order to execute their duty

*Supra*, vol. iii. Case of Petersfield, Note (A),  
p. 17.

in their counties, prove nothing farther than that they are improper persons to be elected; and there are many instances where it has been voted a breach of privilege to appoint a member of Parliament to the office of sheriff (1). The question, however, on the present occasion, is not as to the capacity of members of Parliament, afterwards made sheriffs, to retain their seats; so that all instances of that kind, as well as all those where there was no complaint, or, if there was a complaint, no decision, ought to be laid entirely out of this case.

Sir Edward Coke's case is of the last mentioned sort, for there was no decision upon it. Indeed, the history of that affair militates strongly against the doctrine maintained on the part of the sitting member.

He was made sheriff, together with *six* others, (R) with the express arbi-

(1) *Quære?*



trary design of excluding them from Parliament. Yet, although the patriots who sat in that Parliament, were full of zeal against the despotic measures of the court; although this measure must have excited their heavy indignation; although we must presume that every argument which legal and constitutional learning could furnish, or the acuteness of the ablest men of the time supply, was employed; yet neither the Committee of elections, nor the House, ever ventured to resolve that a sheriff was eligible, or might sit in Parliament. Their inclinations and wishes, no doubt, urged them to such a resolution, but, as interpreters of the law, they found it impossible.

Longe's case was not tried in Parliament, but, when the House came afterwards to indemnify him, for the imprisonment and ruinous fine imposed on him by the Star-chamber, in consequence of a most oppressive prosecution (S), they did not determine, that he was, when sheriff, eligible to Parliament, which, on that occasion, they most assuredly would have done,

done, if they had not felt that it was impossible to explain away, or controvert, the law on the subject.

The only cases where the point was fairly brought to a decision, are those of Sir George Selby and Mr. Hatcher, and that of Abingdon. The first proves that a sheriff of one county cannot be chosen for another. We are told that this happened in the reign of a tyrant; but it is to be considered that the House of Commons were hardly ever more zealous or successful guardians of their own privileges than under that tyrant; and that, if such an argument is admitted, in its full latitude, to invalidate the authority of decided cases, the effect will be, to make a great part of the records of Parliament mere waste paper. Longe's case seems to be tantamount to a determination that a sheriff is not eligible for a *borough without* his county. Hatcher's and the Abingdon case shew that sheriffs are as incapable of representing boroughs as counties; and it is  
well

well known (1) that the Committee, in deciding the latter, did not go upon the supposed difference between a borough *within*, and one *out of*, the sheriff's jurisdiction. In short, the adjudged cases prove the general doctrine, and confirm the "*Nonumus*" in its full extent.

Upon the whole, the Committee cannot determine the present cause in favour of the sitting member, without, in effect, repealing a positive clause in the parliamentary writ; which, however introduced, whether before, or in consequence of, the act of 46 Edw. III, is now part of the law of the land. Indeed, if it were not, it cannot be conceived that it would have been overlooked at the time of the petition of rights, and of the Revolution. But it has remained and gained daily strength by a continued usage, much longer than what has been sufficient to establish some of the

(1) *Quære?*

most important parts of the law, whose original introduction is neither so ancient, nor so well founded, as that of the "*Nolumus*." Thus common recoveries, though contrived to evade a positive act of Parliament, and of much more modern date than the "*Nolumus*," are now so clearly part of the law of England, that they cannot be questioned in any court of justice. In like manner, imprisonment for debt is now an undeniable part of the law, yet it is not founded on any statute, but was brought into use by mere inference and implication. Prynne, indeed, has said (1), that the parliamentary writ, not being what is technically called "*original*," is alterable, and cites instances of temporary alterations actually made in it, in former reigns. But those instances, though they shew the thing to have been done "*de facto*," do not prove that it was legal or constitutional, no more than the examples of qualifications to serve in Par-

(1) Animadv. p. 13.

liament,

liament, altered in those times, as the same author observes (1), by the King, at his pleasure, prove the legality of such alterations, or that they might be lawfully put in practice at this day. Surely if any writ ought to be sacred, *this* should, which concerns the most important birth-right of the subject. On this Lord Coke, (whose opinion as a *lawyer*, was as superior to Prynne's, as *his* diligence as an *antiquarian*, seems to have surpassed Lord Coke's,) delivers his sentiments very clearly. His words, indeed, in the passage now alluded to, have been quoted by the counsel on the other side, to invalidate the authority of the "*Nolumus* (2)," but it being now demonstrated, that the prohibitory clause is a legal part of the writ, they certainly apply to shew that nothing but an act of Parliament can expunge or annul it: Yet, a decision of the Committee, declaring that Mr. Fleming was

(1) *Animadv.* p. 13.

(2) *Supra*, p. III.

eligible at the last general election, would amount to nothing less.

The Committee, after deliberation among themselves, directed the Chairman to inform the counsel, that they had come to the following resolution :

Resolved, “ That it is the opinion of  
 “ this Committee, that John Fleming, Esq;  
 “ being sheriff for Hampshire at the time  
 “ of the last general election, was eligible  
 “ to serve in Parliament for the town of  
 “ Southampton.”

Being made acquainted with this resolution, the counsel for the petitioners said, They would prove that the sheriff of the town, in making out his precept to the returning officer at the last election, had not followed the words of the writ, as is the established practice, but had omitted the “ *Nolumus.*” That, though the Committee had now determined that the sheriff of Hampshire was eligible notwithstanding the “ *Nolumus* ;” yet the sheriff of Southampton had no  
 right



right to anticipate such a determination. That, if the "*Nolumus*" had been in the precept, it might, perhaps, have weighed with the electors, so as to induce many to vote for Lord Charles Montagu, who, in the event which happened, had voted for Mr. Fleming. They said, they could show that the omission was the effect of improper partiality, and contrived with a view to serve Mr. Fleming. That the electors had demanded to see the writ, and were refused. That, on this ground, the election ought to be avoided. That, if it were not, this would be a precedent of a most dangerous tendency, because it would furnish future sheriffs with a pretext to garble and mutilate the writ in other parts, in such manner as might suit their particular ends.

The counsel for the sitting member contended,

That those on the other side had not a right to go into evidence of the facts they now alleged, because there was no charge on that ground contained in the petition,  
and

and they were not, therefore, prepared to answer or make a proper defence to this new complaint. That the petition itself proved the electors to have known the contents of the writ, since it recites the "*Nolumus*;" so that it is impossible to suppose the election would have been otherwise, if it had been inserted in the precept. That the only petitioners before the Committee were voters who had given their suffrages for Lord Charles Montagu, and that *they* could not complain of being misled by the omission of the "*Nolumus*." That, in the case of Petersfield, the Committee had refused to let the counsel for the petitioners go into an objection, although mentioned in the petition, because it was not directly alleged as a specific ground of complaint (1).

In reply, on the part of the petitioners, it was argued,

That the general allegation in the petition, of the undue return of the sitting member, was sufficient to entitle them to

(1) *Supra*, Vol. iii. p. 7, to 11.

go into the proof of the facts suggested. That it surely cannot be necessary to set forth specially in a petition every circumstance which contributes to vitiate an election and return. That the Committee had the writ and precept both before them. That both were, *ex necessitate*, evidence in the cause, and therefore they must take notice of the irregularity in the precept, and there could be no reason why the petitioners should not be suffered to give evidence of such facts as might serve to explain the causes and motives of that irregularity. That, although, in the Peterfield case, the objection happened to prevail, it seemed so groundless to the counsel for the sitting member, that one of them would not speak in support of it (1).

The court being cleared, the Committee, after deliberation, came to the following resolution, which they directed the Chairman to communicate to the counsel :

(1) Mr. Hardinge. *Vide supra*, Case of Petersfield, Vol. iii. p. 10.

Resolved,

Resolved, "That the evidence proposed  
 "to be given cannot be gone into, the mat-  
 "ter not being alleged in the petition."

In the beginning of the cause, after the leading counsel for the petitioners had opened their case, Mr. Bulkeley, one of the three returning officers, was called, and asked, If it was known at the time of the election, that Mr. Fleming was sheriff of Hampshire.—The purpose of this evidence was to show (if the Committee should think the sheriff ineligible) that the votes given for him were thrown away.

The question was objected to.

It was admitted to be a general rule, that where there is a legal incapacity, and the fact of a candidate's being under such incapacity is known, the votes given for him are thrown away. But it was contended, that there was no special allegation in the petition, that the fact of Mr. Fleming's being sheriff was known, at the

time of the election, to the electors, and that, therefore, no evidence could now be received to prove what was not directly alleged in the complaint. That the rule, just and expedient in itself, was firmly established by the decision in the case of Petersfield. That, in the petition in the Abingdon case, the fact of the notoriety of Mr. Mayor's being sheriff, was particularly set forth. That the allegation in the present petition was, that Mr. Fleming was sheriff, and that the circumstance of *that's* being known to the electors was a distinct fact, and was not stated.

This point having been argued by the counsel, the Committee, after deliberation, informed the counsel, That they were of opinion *not* to hear the evidence offered, *then*.

After the great question was decided against the petitioners, it became unnecessary for their counsel to try to be let into this evidence.

On Monday, the 12th of February, the Committee, by their Chairman, informed the House, that they had determined,

That the sitting member was duly elected (1).

(1) Votes, p. 306.



## N O T E S

ON THE CASE OF

## S O U T H A M P T O N.

PAGE 87. (A) In this, and several of the foregoing cases, when any question of construction has arisen on the words of a petition, I have thought it proper to set forth the whole of the petition, or the entry of it in the votes, which (except that the formal beginning and conclusion are omitted, and the petition is there thrown into the shape of a recital), is exactly the same.

P. 91. (B) The mayor and two sheriffs are called, "The returning officer" in the singular number, by a kind of legal figure, as the office is one, though executed jointly by three persons. Thus, in like manner, the two sheriffs of London are called, in the singular number, sheriff of Middlesex.

P. 94. 109. 130. 135. (C) The following note upon that passage in Whitelock where he mentions this petition of 13 Edw. III. was furnished me by a gentleman at the bar, who has deserved well of the public by being the editor of Glanville's reports, and whose accuracy, I believe, may be relied on. (*Vide Infra*, Note (O.))

" Whitelock's

“ Whitelock’s assertion is erroneous. There is no  
“ such petition upon the roll of Parliament of that  
“ year. I have perused the whole of that roll  
“ with attention; and the only article relative to  
“ elections, is No. 22. which only directs, that it  
“ be inserted in the writ of election, that two knights  
“ *girt with swords* shall be returned for counties.”

P. 96. (D) It is very observable, that this statute  
of 5 Rich. II. and the other four passed at the same  
time, are, in the preamble, called “ Ordinances  
“ and establishments;” and in the title, “ *Ordina-*  
“ *tiones & concordie.*”

P. 99, 100. 113. 131. (E) There was, in this case,  
much argument concerning the statute of 4 Hen. IV.  
*cap.* 5. and the clause in the sheriff’s oath, by which this  
residence in his county was required; but the history  
of the oath was not explained. The ancient oath of  
office taken by sheriffs is in the Register, fol. 201,  
202. to which, in the course of time, large additions  
were made, as appears by comparing the form in the  
Register with *that* given in Dalton (fol. 9, 10).  
In the additional part is contained the clause en-  
joining residence, set forth in the text (*supra*, p.  
99). This clause was, no doubt, introduced in  
consequence of the statute, although it may be ob-  
served, that, in the statute, there is no authority for  
that part which allows a dispensing power to the  
King. The framers of the oath imagined *that* to be  
an inherent part of the royal prerogative. When  
Sir Edward Coke was made sheriff of Buckingham-  
shire in order to prevent his being chosen to Parlia-  
ment,

ment, he objected to four of the additions to the oath (Cro. Car. p. 25, 26.); whereupon, in consequence of a conference of all the judges with the Lord Keeper, one of the additions, *viz.* that by which the sheriff was to swear that he would do all in his power to destroy, and make to cease, all manner of Lollardies, &c. within his bailiwick, was struck out by an order of Council, (Parl. Hist. vol. vi. p. 422.) as having been inserted in consequence of the statutes of 5 Ric. II. stat. 2. cap. 5. and 2 Hen. IV. cap. 15. which statutes were repealed, on the establishment of the Protestant religion, by 1 Edw. VI. cap. 12. and 1 Eliz. cap. 1. But it is observable that Coke took no exception to the clause concerning residence; and it is said that, during the short continuance of the second Parliament of 1 Car. I. when his right to sit in Parliament was agitated, he used to sleep every night at his house in Buckinghamshire, in order to comply with the oath and statute. Whitelock tells us that the King usually dispensed with the residence of sheriffs in their counties (vol. ii. p. 368, 369); however, that had not been done in Longe's case. But, in the reign of George I. a new oath was framed for all sheriffs, (excepting those of Chester and Wales) and, by the stat. of 3 Geo. I. cap. 15. § 18, was substituted in lieu of the former; varying from it in some respects, and, particularly, containing no obligation to residence. By § 20. of the same act, it is provided, that the sheriffs of Wales and Chester shall continue to take the ancient oath; but it is also provided, that, with respect to them, the clause concerning

cerning residence shall be left out. This statute does not expressly repeal that of Hen. IV.; but it seems, by fair and reasonable construction, to have that effect; and, if so, any disability arising from the necessity imposed on sheriffs by that statute, of residing in their counties, is now removed. The stat. of Geo. I. and the alteration thereby made with regard to the oath, were not mentioned on either side, in this cause.—Littleton, in his argument in Longe's case, explains the French word "*demurrant*," in the act of Hen. IV., to mean "*resiant*." He cites Jeffries' case (5 Rep. p. 67, a.) to prove, that a man may be *resident* where he doth not *inhabit*, if he *occupies* lands there; and says it was resolved in Coke's case, that it was necessary, by 1 Hen. V. cap. 1. that knights of the shire should be *resiant* in the counties for which they were chosen; and that he (Coke) was held to be *resiant* in Norfolk, because he had lands there, although he *inhabited* elsewhere. But, in the first place, there was certainly no point *resolved* in Coke's case, if by "*resolved*," is meant, "*decided*;" in the second place, according to this explanation of the word "*resiant*," a person might be entitled to be considered as being, at one and the same time, *resiant* in every county in England, which would be absurd; and, in the third place, "*demurrant*," in the stat. of Hen. IV. seems to be very properly translated by "*abide*" in the statute-book, and by "*dwelling*," in the ancient oath. This is agreeable to the sense of the modern French word "*demeurer*;" and, if the anecdote is true relative to

Sir

Sir Edward Coke's sleeping during his shrievalty in Buckinghamshire, it is clear that *he* understood the statutes and oath to mean "*dwelling*." In Jeffries' case it is only said, that a man who manures lands in a parish is thereby resident upon them, and a parishioner, *to the purpose* of being taxed to repair the church, &c.

P. 105. (F) Littleton was so far interested, that he was counsel for Longe; so that it is his *argument*, not his *opinion*, which he gives in his report. He was not made a judge till 15 Car. I. *Vide* Cro. Car. p. 565. *Vide* also Parl. Hist. vol. viii. and the Life of Littleton prefixed to his Reports.

P. 106. Note 2. (G). The reasoning in the Prince's case, in the 8th Report, seems to me to favour the opinion that 46 Edw. III. is a statute. It is there shown, that a statute may be in the form of a grant, or of a charter or letters patent from the King; that there used to be great variety in the penning of acts of Parliament; that there are many which are indited, "*Quod DOMINUS REX statuit*;" and that, in such cases, if they be entered in the Parliament-roll, (which 46 Edw. III. was), and always allowed for acts of Parliament, it shall be intended, that it was by authority of Parliament, (8 Rep. 20, b.) The report goes on to say, "But if an act be penned, that the King, with the assent of the Lords, or with the assent of the Commons, it is no act of Parliament; for three ought to assent to it, *scil.* the King, the Lords, and the Commons; or other-  
" wife,



“ wise, it is not an act of Parliament : and by the  
“ record of the act it is expressed which of them  
“ gave their assent, and that excludes all other in-  
“ tendments that any other gave their assent ; and  
“ so there is a difference between a general and par-  
“ ticular penning of an act of Parliament.” (*loc. cit.*)  
*Magna Charta* itself is in the form of a charter ; and it  
is singular that in the Prince’s case it was thought  
necessary to bring arguments to prove it to have been  
a statute (p. 19, b.). But if an act of Parliament  
may be in *that* form, surely it may be in the form of  
an ordinance ; and when the accord and assent is ex-  
pressed *generally*, (as in 46 Edw. III.) it may  
and ought to be *intended* that the Lords and Com-  
mons joined in such accord and assent. In the place  
just cited, *Magna Charta* is said to be proved to be an  
act of Parliament, by *implication*. To this indeed is  
added, “ That it always hath had the allowance of  
“ an act of Parliament, and therefore ought to be so  
“ taken.” But so (it may be said) had the 46  
Edw. III. till its authority began to be called in  
question in the reign of Jac. I.

As to the words prohibiting the election of lawyers,  
that part of the statute, (if it is one) seems to have  
fallen into disuse by a sort of tacit consent, as hap-  
pened to the statutes of residence *Vide. supra*, vol. i.  
p. 341. Note (D.)

P. 109. (H) It is very difficult to account for the  
particular omission of the “ *Nolumus*,” in the writ  
for Bristol ; but it seems to favour the opinion, that  
sheriffs were never meant to be ineligible as *bur-*  
*gesses*.



*gesſes*.—Till 23 Hen. VI. there was no precept iſſued to boroughs, but the general writ was the only authority for the choice of all the members in the county as well burgeſſes and citizens, as knights of the ſhire. (*ſupra*, vol. i. p. 426. and p. 450. Note (C)). Briſtol having become a county in itſelf about the end of Edward III.'s reign, and a ſpecial writ being thereby neceſſary to the ſheriff of the place, ſince he had no *knights* of the ſhire to elect, it was unneceſſary, and would have been improper, if ſheriffs were eligible as *burgeſſes*, to insert the “*Nolumus*” in his writ. But why then was it not in like manner omitted in the writs to the ſheriffs of other counties corporate? Perhaps it was. Or, perhaps, the members for other counties were, at that time, conſidered as knights of the ſhire. Thoſe for Briſtol ſoon began to be looked upon in that light. This appears by comparing together the two following very curious returns.

“*Virtute iſtius Brevis elegi & venire feci ad præſent.*  
 “*Parliamentum domini Regis apud Weſtm. in craſtino,*  
 “*ſancti Edmundi Regis prox. futur. duos BURGENSES*  
 “*de diſcretioribus & magis ſufficientibus, qui in navigio*  
 “*& exercitio merchandiſarum notitiam habent meliorem,*  
 “*viz. Walterum Derby & Thomam Beaupine.*”—  
 This was ſoon after Briſtol was made a county.—  
 But, in 14 Hen. IV. the return was,

“*Noſcunt univerſi per præſentes, quod nos Major &*  
 “*communitas villæ Briſtol, unanimi aſſenſu noſtro &*  
 “*conſenſu, conſtituimus & in loco noſtro poſuimus dilectos*  
 “*nobis*

“ *nobis in Christo, Thomam Fische & Thomam Thony,*  
 “ *comburgenses nostros, tam ut MILITES pro COM. Bris-*  
 “ *tol., quam ut BURGENSES villæ & burgi Brisfol.*  
 “ *pro eisdem com. villa & burgo ad essend. ad Parliamen-*  
 “ *tum, &c.* Carew’s Law of Elections, p. 94.  
 col. 2.

It is perhaps fair to conjecture that, as soon as they began to be reckoned *knights of the shire*, the “ *Nolumus*” was inserted in the *writs*;—but this is nothing but conjecture.

P. 114. (I) This argument is used by Sir Simonds D’Ewes, (p. 39.) in his observations on the writ, and the argument on the other side, drawn from the necessity that a sheriff should reside in his county, is stated by him in the same place, and answered thus, “ That  
 “ it was very common, formerly, for the same person to be sheriff, at the same time, for more than  
 “ one county, in which case he could not reside in  
 “ both, &c.” *Ibid.* and p. 336.

P. 115. (K) The Parliament of 34 and 35 Hen. VIII. met first, 8 Jan. 1542-3, which was the 33d year of Hen. VIII. (*Vide Ruffh. Ed. of the Stat.*) It appears, by the imperfect bundle of writs and returns for Cambridgeshire of that year, which are the only ones that are not lost from 17 Edw. IV. to 1 Edw. VI. (*Vide Willis Not. Parl.*) that North was then returned. The statute referred to expressly mentions him as sheriff in 34 and 35 Hen. VIII. Hence it follows that he must have been appointed  
 sheriff

sheriff *after* he was chosen to Parliament. This is not noticed by Littleton.—The statute is not printed in Ruffhead's edition, but is to be found in Rastal, and in the folio black letter edition. See also Co. 4. Inst. p. 46. Willis *Not. Parl.* Vol. ii. p. 139. and Prynne, Brev. Parl. Rediv. Vol. iv. p. 514, 515, 516.

P. 115. (L) This Parliament met 23 Nov. 1584. (D'Ewes, p. 332.) The writs must have issued at least 40 days before; for the regulation making that interval of time necessary was only *confirmed* by 7 and 8 Will. III. cap. 25. § 1. It *existed* long before, as appears from Co. 4 Inst. p. 4. The writs, therefore, must have been dated, on this occasion, at least as early as 14 Oct. and the election probably took place some time in that month: The annual appointment of sheriffs is on All Soul's-day, 2 Nov. It follows then, that, if Sir E. Dymock was elected at the general election, and made sheriff at the regular time, he must have been in the House of Commons *before* his appointment to be sheriff.

P. 116, 117. (M) The — Saintpole, Esq; mentioned by D'Ewes, (*loc. cit.*) and afterwards called, by the same author, Mr. St. Poole, in the case of Nowell, (*Ibid.* p. 625.) is evidently the same person with Sampole mentioned by Whitelock, (Vol. ii. p. 369, Note e,) with Sir Geo. Sampal, mentioned by Littleton (p. 329), and with St. Paule, in the Journals, vol. i. p. 825. col. 2.—If we can credit what is said of this case by Littleton, who cites the Journal-book of the House of Commons (since lost) for his authority, Sampal was made sheriff *after* his election to Parlia-

Parliament. But Littleton also states him to have been a *burgess*, whereas Sir S. D'Ewes, whenever he mentions his case, calls him *knight of the shire*; and, since the accuracy of this last-mentioned author is well established, and there are innumerable mistakes (some of which have been pointed out) in Littleton's argument, I conclude that he did not *find* in the Journal-book, that Sampal, or St. Poole, was a *burgess*; nor any direct words, shewing him to have been made sheriff *after* he was a member of Parliament. However, on a comparison of dates, we shall find that the fact most probably was, that his election was antecedent to his appointment. The Parliament of 31 Eliz. was *summoned* to meet 12 Nov. 1588, (D'Ewes, p. 428.) although it was on that day *pro-rogued*, and did not, *in fact*, meet till 4 Feb. following. The writ, according to what has been said in the foregoing note, must have issued at least as early as 3 Oct. and the election probably took place before the 2 Nov. when the annual sheriffs were appointed.

P. 116. (N) There is no such name as Nin in Willis's lists; and I suppose no such person ever existed. As to him and Covert, Littleton first says, they were sheriffs and *knight*s, and then, in the same sentence tells us, that Covert was member for Peterfield. Covert appears, in fact, to have been *burgess* for that place, by Willis's list of the Parliament of that year, Vol. i. p. 133.

P. 119. (O) It will be curious and interesting, to see the whole entry concerning the report made on this occasion; for, though it consists only of broken hints,  
it

it shows that the question had been then very thoroughly canvassed.

27 Feb. 1625-6. “ Sir Jo. Finch reporteth the  
 “ case about the election of Sir Edward Coke :  
 “ wherein the Committee delivered no opinion.—  
 “ The writ first read, wherein the *Nolumus*. A  
 “ search, by a select Committee, of the records  
 “ and precedents.—

“ That, before the *Nolumus*, 46 Edw. VI.\* sheriffs  
 “ eligible, and did serve here, as holden by some ;  
 “ and all others, not members of the higher House :  
 “ Others, that sheriffs, by the common law, were not  
 “ eligible.—Hath *custodiam comitatus* ; so as his at-  
 “ tendance necessary in the county : is a judge,  
 “ which cannot perform by a deputy.—That a mem-  
 “ ber of the House, chosen sheriff, shall serve ;  
 “ *contra*, before.—Resembled to the case of one in  
 “ execution.

“ For the writ ; some, that other things in the  
 “ writ, not observed : *Milites, gladiis cinctos : Ma-  
 “ nucautores : Qui interfuerint* at the reading of the  
 “ writ. By others these holden to be matters of  
 “ form ; the other of substance : And, that not safe  
 “ to question a writ so long used.—

“ From 49 Hen. III. till 13 Edw. III. no men-  
 “ tion of this *Nolumus*. Then a prayer of the Com-  
 “ mons, that no sheriff, or other minister, might be

\* This should be Edw. III.



“ returned knight \*. 46° Edw. III. an ordinance  
 “ made against sheriffs, and lawyers, to be knights  
 “ of shires. Divers questions made upon this ordi-  
 “ nance: 1, Whether this ordinance an act of  
 “ Parliament: 2dly, admitting, it were no act of  
 “ Parliament, yet, whether not, in respect of the  
 “ weight of it, and usage, equal to an act of Par-  
 “ liament.—47° Edw. the *Nolumus* came in; but  
 “ none in those to the Five Ports, then, or sithence †.  
 “ Omission of it also in some writs to *Bristow*; but  
 “ . . Rich. II. ‡ came in to *Bristow* . . Rich. the  
 “ clause wholly as now. 7 Hen. IV. a bill exhibited  
 “ by the Commons, for a free election, notwith-  
 “ standing any commandment, or . . to the con-  
 “ trary. 8°, 10°, and 12°. no *Nolumus*: 14 Hen. IV.  
 “ the *Nolumus* came in, and continued as now.—

“ Three modern precedents: 31° Eliz. St. Paule’s  
 “ case: 42° Eliz. . . . 12° Jac. Tellye’s case ¶; who  
 “ a sheriff for life.—

“ 1. No opinion from the Committee, delivered.

“ The debate hereof respited till *Friday* next, vol.

“ i. p. 825. col. 1, 2.”

On the Friday, nothing seems to have been done in  
 it. *Ibid.* p. 829, 830.

P. 121. (P) There does not appear in Willis’s  
 lists, any person of the name of Croke, who served in

\* As this is mentioned here as well as in Whitelock, it is  
 probable there was such a petition; but that there is a mis-  
 take in the date, or roll. *Supra*, p. 150, Note (B)

† *Quare?*

‡ *Quare?*

¶ Should be *Selby’s*, *vide supra*, p. 118.



the long Parliament, begun in 1640, and dissolved, *de facto*, by Cromwell, in 1653. One of the two members for the city of Oxford in Cromwell's Parliament, summoned in 1656, was Richard Croke, and, in the Parliament summoned Jan. 1658-9, the two members for that city were, Richard Croke and Unton Croke. (Willis, *Not. Parl.* Vol. i. p. 277. 291.) The case alluded to must be one of these, and cannot be of much authority.

P. 125. (Q) This is the case which should have been mentioned in page 434 of Vol. i. and p. 452: Note (F). The mistake was occasioned by the names of the candidates being the same in 1766 and 1768; but, in the latter case, there was no question about the eligibility of sheriffs.

P. 137. (R) Mr. Hume says *four*, and seems to think that Coke was not chosen. Rapine, and other general historians, mention this transaction, though a matter of considerable consequence, with great inaccuracy. Indeed, this is one, of many proofs which might be adduced, of the inadequate account commonly given by mere historians, of events which turn on questions of law. Sir Edward Coke takes a particular pleasure in remarking the blunders in the chronicles of his days. Unfortunately, their authors might, with too much justice, have retorted the charge upon him; with respect to his remarks and assertions, concerning many of the most important points of legal and constitutional antiquity. Even Prynne, who has been indefatigable in discovering blemishes of this sort in the writings of Coke, has,  
in

in some degree, merited the same censure. (Willis, Vol. ii. Pref. p. 3. Pref. to Parl Hist.)—Those who undertake the irksome task of investigating matters of high antiquity, and of decyphering the obscure meaning of imperfect records, which frequently contradict each other, ought to be very indulgent towards their predecessors in such useful, though unambitious, inquiries.

P. 138. (S) The real cause of the prosecution of Longe was that he was one of the popular members in the Parliament of 1628; and was concerned with Sir John Elliot, Mr. Selden, Mr. Hollis, Mr. Valentyne, and others, in locking the door of the House, and detaining the Speaker in the chair, on the last day of the actual sitting of that Parliament, after he had delivered the King's message. For this offence, he was one of those against whom a joint information was exhibited in the Star-chamber. (Parl. Hist. Vol. viii. p. 359, &c.) Afterwards this information seems to have been dropt, and Elliot, Hollis, and Valentyne, were proceeded against by information in the court of King's Bench. (*Ibid.* p. 376, &c. 381. 388. Cro. Car. p. 181, 182. 604, to 610.) But, it having been thought more advisable to attack Longe on the ground of a breach of his oath as sheriff, a new information was exhibited against him in the Star-chamber, the event of which is stated in the text. (*Vide* Parl. Hist. 378 to 381.)—It is said, in the debates on Hatcher's case, by Sir Job Charlton, that Longe having answered that he never took the oath, the thing was changed, and he was

fined for exercising the office without taking the oath (Grey's Deb. Vol. iv. p. 317). This, however, is a palpable mistake. In the interrogatories administered to him, it was charged, that he had taken the oath of sheriff, and in his answer he said, " He had taken " an oath." Upon this, it was argued, on his behalf, that, in a criminal matter, nothing can be taken by inference, and that, there was not here a direct confession, of his having taken the *particular* oath of sheriff. The Chief Justices, and Lord Keeper, over-ruled this argument, and said, that it must be intended that he had confessed the ordinary oath which sheriffs ought to take, Littelt. p. 327, 328.; and, accordingly, the judgment, or sentence, proceeded on his having committed a breach of his oath. Parl. Hist. Vol. viii. p. 380.

XXXIV.

THE SECOND

C A S E

Of the BOROUGH of

I V E L C H E S T E R,

In the County of SOMERSET.

M 3

The day appointed for choosing this Committee was Friday the 16th of February, but, as the House was not complete on that day, nor the next, the Committee was not balloted for till the Monday following.

On Monday, the 19th of February, the Committee was chosen, and consisted of the following Gentlemen :

Hon. John St. John, Chairman,	Members for	Eye.
Joshua Mauger, Esq;		Poole.
Philip Yorke, Esq;		Helleston.
Sir Charles Cocks, Bart.		Ryegate.
Hon. Thomas Walpole.		King's Lynn.
Sir Matthew White Ridley, Bart.		Newcastle.
William Hervey, Esq;		Effex.
Walter Stanhope, Esq;		Carlisle.
John Mayor, Esq;		Abingdon.
Anthony Storer, Esq;		Carlisle.
Sir Hugh Williams, Bart.		Beaumarais.
Whitshed Keene, Esq;		Montgomery.
Sir James Cockburne, Bart.		Peebles, &c.
N O M I N E E S.		
<i>Of the Petitioners,</i>		
Sir Alexander Leith, Bart.		Tregony.
<i>Of the Sitting Members,</i>		
John Moreton, Esq;		Wigan.

#### P E T I T I O N E R S.

Richard Brown, Esq; and Inigo William Jones, Esq;

#### *Sitting Members.*

Nathaniel Webb, Esq; Owen Salusbury Brereton, Esq;

#### C O U N S E L

#### *For the Petitioners.*

Mr. Mansfield, Mr. Alleyne.

#### *For the Sitting Members.*

Mr. Lee, Mr. Morris.

## THE SECOND

## C A S E

Of the BOROUGH of

## IVELCHESTER.

**I**N consequence of the determination of the Committee, on the 4<sup>th</sup> of December, that the former election for Ivelchester was void (1), a new writ was ordered (2); and, the election coming on upon the 14<sup>th</sup> of the same month, Mr. Webb and Mr. Brereton were candidates, together with Mr. Brown and Mr. Jones, the two petitioning candidates

(1) *Supra*, p. 169.(2) *Votes*, p. 153. 4 Dec. 1755.



on the former occasion. Webb and Brereton were returned; and, on Thursday, the 21st of December, a petition of Brown and Jones was presented to the House, complaining of an undue election. The day on which this petition was to be taken into consideration, was, Monday, the 19th of February.

That morning, the parties having compromised the matter, Mr. Brown and Mr. Jones were desirous of withdrawing their petition; and, as soon as the Speaker was in the chair, this was mentioned in the House. Besides the late instance of Mr. Dewar's petition (which case was not exactly parallel to the present (1)) there had been, since the statute of 11 Geo. III. a precedent of leave given to withdraw a petition complaining of an election, on the day appointed for taking it into consideration. This was in the case of the city of London in 1774 (2) (A).

(1) *Supra*, II<sup>d</sup> Case of Cricklade.

(2) Journ. vol. xxxiv. p. 505. col. 2.

It was, however, said, that this was directly contrary to § 4 of 11 Geo. III. cap. 42. the words of which are,

“ And be it further enacted, That, on  
 “ the day appointed for taking any peti-  
 “ tion complaining of an undue election,  
 “ or return of a member or members to  
 “ serve in Parliament, into consideration,  
 “ *the House shall not proceed to any other*  
 “ *business whatsoever*, except the swearing  
 “ of members, previous to the reading  
 “ of the order of the day for that pur-  
 “ pose.”

The hearing a motion for withdrawing a petition, or the giving leave to withdraw it, was, it was alleged, “ *other business*,” different from the consideration of the petition; and, by the express command of the statute, the House was tied up from doing any thing else, except swearing of new members. Some even contended that, on the day of a ballot, there can be *no House* until there are an hundred mem-

bers present; and, that till that happen, the Speaker has no right, on such occasions, to take the chair, although, at other times, forty constitute a House, and entitle him to take the chair.

On the other hand, it was contested, that forty members are sufficient to make a House, on such a day, as well as on any other, for that there is nothing, either in the act of the 10th, or in that of the 11th of Geo. III. to alter the established rule of Parliament in that respect. That members had been frequently sworn in, on the days for choosing Committees, before an hundred members were present; which, if there had not been a House, could not have been done. It was insisted, that the case of giving leave to withdraw a petition, with consent of the parties, was an exception to § 4 of 11 Geo. III. arising from the nature of the thing, and that it was, therefore, unnecessary to make an express provision

vision about it. That, when once all the parties consent to drop a cause, it ought to be considered as never having come before the House, and that all the proceedings which may have taken place, as preparatory to the trial, ought, in such a case, to go for nothing. That, to insist upon appointing a Committee, would often put the parties to great expence, and that the probable effect might be to retard the business of the nation for a course of time. And for what end? Why, to get an hundred men together in order to ballot for a Committee, which, when chosen, would have no cause to try. That, if there had originally been a difficulty, from the manner in which the prohibition to proceed to other business is expressed in the statute, the House had got over it in the case of the city of London (1) (A), and that, the difficulty being thereby removed, that case was a sufficient precedent for the

(1) Journ. vol. xxxiv. p. 505. col. 2.

establishment of a practice so convenient both to the parties, and the House.

The greater number of those members who happened to be present continued of opinion that it was impossible for the House to suffer the petition to be withdrawn, without a direct violation of the act of Parliament.

A Committee, therefore, was balloted for, and chosen; and, having retired into one of the Committee rooms, they appointed a Chairman; and then, instead of adjourning till the ensuing morning, (which, in other cases, is always done after the election of the Chairman, and without entering upon the cause (1) ) they directed the counsel and agents to be called in.

The petition being read, the counsel for the petitioners informed the Committee, that they had no evidence to offer to impeach the seats of the sitting members.

(1) *Supra*, vol. i. p. 57.

On the same day, the Committee, by their Chairman, informed the House (in the usual form) that they had determined,

That the two fitting members were duly elected (1).

(1) Votes, p. 347.



## N O T E S

ON THE SECOND CASE OF

## I V E L C H E S T E R.

PAGE 171, (A).

The CASE of the CITY of LONDON.

On the 13th of January, 1774, being the first day of the session, the Speaker acquainted the House, that, in pursuance of the statute of 10 Geo. III. cap. 41. he had issued his warrant for a new writ for the city of London (among other places) to supply the place of Sir Robert Ladbroke, Knt. one of the four members, he having died during the recess (Journ. vol. xxxiv. p. 391. col. 1.). When the election came on, the Right Hon. Frederic Bull, Esq; Lord mayor of London, and John Roberts, Esq; were candidates. Bull was returned. On the 26th of January, Roberts petitioned the House, and his petition was appointed to be taken into consideration on the 21st of February following. (Same vol. p. 415. col. 1, 2.) On the 17th of February,

the order for that purpose was discharged, and a new day, *viz.* 28th of February, appointed. (Same vol. p. 468. col. 2.)

The first entry in the Journals, of that day, is as follows :

28 Feb. “ Mr. Speaker informed the House, that  
“ he had, on Saturday last, received a letter from  
“ John Roberts, Esq; acquainting him that he de-  
“ sired leave to withdraw his petition complaining of  
“ an undue election and return for the city of Lon-  
“ don.

“ And a member, in his place, having informed  
“ the House, that he had authority from the Lord  
“ Mayor of London, the sitting member, to consent  
“ to the withdrawing the petition of the said John  
“ Roberts, Esq;

“ Ordered, That John Roberts, Esq; be at liberty  
“ to withdraw his petition, complaining of an undue  
“ election and return for the city of London.

“ Ordered, That the order, for taking the said  
“ petition into consideration on this day, be dis-  
“ charged.” (Same vol. p. 505. col. 2.)

It may be worth remarking, that this happened the very day after leave was given to bring in a bill for making the two acts of 10 Geo. III. c. 16. and 11 Geo. III. c. 42, perpetual. (Same vol. p. 505. col. 1.)



XXXV.

T H E

C        A        S        E

Of the COUNTY of

F        I        F        E,

In S C O T L A N D.

VOL. IV.

N

The Committee was chosen on Tuesday, the 19th of March, and consisted of the following Gentlemen :

Frederick Montagu, Esq;	Members for	Higham Ferrers.
Chairman.		Cirencester.
Samuel Blackwell, Esq;		Preston.
Sir Henry Hoghton, Bart.		Pembroke.
Hugh Owen, Esq;		East Retford.
Sir Cecil Wray, Bart.		Whitchurch.
Right Hon. Thomas Townshend,		Grampound.
Richard Aldworth Neville, Esq;		Bishop's Castle.
George Clive, Esq;		Minehead.
Thomas Pownall, Esq;		Worcestershire.
William Lygon, Esq;		Cardiganshire.
Viscount Lisburne,		Durham County.
Sir John Eden, Bart.		Thirsk.
Thomas Frankland, Esq;		
NOMINEES.		
<i>Of the Petitioner,</i>		
Cosmo Gordon, Esq;		Nairnshire.
<i>Of the Sitting Member.</i>		
Thomas Dundas, Esq;		Stirlingshire.

#### PETITIONER.

John Henderson, Esquire.

#### *Sitting Member.*

James Townshend Oswald, Esquire.

#### COUNSEL

#### *For the Petitioner.*

Mr. Campbell,                      Mr. Elliot.

#### *For the Sitting Member.*

Mr. Crosby,                      Mr. Macdonald.

( 179 )

THE  
C A S E

Of the COUNTY of

F I F E.

**A**T the last general election, John Scot, Esq; was chosen member of Parliament for the county of Fife; but, a vacancy having happened during this session by his death, a new writ was issued, and the election took place, at Cupar, the county-town, on the 24th of January, 1776.—Mr. Oswald and Mr. Henderson were candidates. The former being returned as duly elected, Mr. Henderson petitioned the House on the 13th of February (1).

On Wednesday, the 20th of March, the Committee being met, the petition was

(1) Votes, p. 313, 314.

N 2

read.



read. It contained a detail of several of the circumstances which happened on the day of the election, relative, both to the making up of the freeholders roll, according to the statute of 1681 (1), and to the election itself (2). But the greatest part of these it will be unnecessary to state in this place, as they were not the subject of discussion before the Committee.

It appeared, by the admission of both parties, that, at the close of the poll, Mr. Oswald had 61 votes, and Mr. Henderson only 60; so that there was a majority of one for the sitting member.—But, as the petitioner had objected to the legality of several of the votes given for Mr. Oswald, the *præses* of the meeting, having joined with Mr. Henderson in a protest, delivered his casting voice (3) in favour of Mr. Henderson. This he would have been entitled to avail himself of, in case it should have turned out, on the trial of the petition,

(1) 3d Parl. Car. II. cap. 21.

(2) Votes, *loc. cit.*

(3) 16 Geo. II. c. 11. § 13.

that

that the number of legal votes was equal on both sides.

On entering upon the trial, the counsel for the petitioner informed the Committee, that they intended to object to two of the votes for the sitting member; and the counsel for Mr. Oswald said, they meant to object to one of those for Mr. Henderson.—As it would have been unnecessary for the Committee to enter upon the question of the legality of this last-mentioned vote, if they should be of opinion that the votes objected to on the part of the petitioner, were either both bad, or both good, it was agreed that they should proceed first to hear the counsel, and decide, upon those votes. It will be proper to give a separate account of the facts and arguments relative to each.—The names of the two voters were Hugh Dalrymple, Esq; and William Melvil, Esq.

The CASE of Hugh Dalrymple, Esq; of  
Fordon.

Mr. Dalrymple was enrolled at the last election meeting. What passed on that  
N 3 occasion,

occasion will be best understood by the following extract from the minutes, as attested and signed by the clerk of the meeting.

“ Thereafter there was presented and  
“ given in to the meeting a claim for Hugh  
“ Dalrymple of Fordel, Esq; setting forth,  
“ That the claimant stands infeft in the  
“ lands of Powguild and Glenningstone,  
“ with the parts and pendicles thereof, ly-  
“ ing within the parish of Auchterderran,  
“ and shire of Fife, but redeemable from  
“ him by the Honourable James Wemyss  
“ of Wemyss, at Whitsunday, 1777, or any  
“ term of Whitsunday thereafter, on pay-  
“ ment or consignation of 20 l. sterling, and  
“ held of the Crown, all conform to char-  
“ ter of resignation, under the Union-  
“ seal, of the said lands, in the claimant’s  
“ favour, dated 3 July, 1766, and to his  
“ seizin following thereupon, dated 21  
“ August, 1766, and recorded in the ge-  
“ neral register of seizins at Edinburgh, the  
“ 20th day of September thereafter.

“ To

“ To instruct (1) that the claimant’s  
“ title is a proper wadset, there is here-  
“ with produced the disposition of the said  
“ lands by the said James Wemyss in the  
“ claimant’s favour, whereupon the said  
“ charter proceeds. And, to instruct that  
“ the said lands are above 400 *l.* Scots of  
“ valued rent, there is produced a certifi-  
“ cate under the hands of the clerk and  
“ two commissioners of supply, bearing  
“ that the lands of Glenningstone stand  
“ valued, in the cess-books, at 309 *l.* Scots,  
“ and the lands of Powgild, at 579 *l.*  
“ Scots.

“ Upon these titles, Mr. Dalrymple  
“ claims to be enrolled in the roll of free-  
“ holders for the shire of Fife, having  
“ right to vote at the election of a mem-  
“ ber of Parliament. The said Hugh Dal-  
“ rymple’s titles, referred to in the claim,  
“ were also produced to the meeting.

“ It was objected to the said Hugh Dal-  
“ rymple, that he formerly claimed to be  
“ enrolled in the county, and his qualifi-

(1) Prove.

“ cation was found to be insufficient.  
 “ That he has now again claimed upon  
 “ the same title ; and the only difference  
 “ between his present claim and the for-  
 “ mer one is, that he now produces a dis-  
 “ position from Mr. Wemyss of Wemyss,  
 “ as the ground of his charter ; but that  
 “ this disposition will not aid him, because  
 “ it appears to be redeemable, and at  
 “ the same time is not a *proper wadsett*,  
 “ which is the only species of redeem-  
 “ able right which gives a vote. That it  
 “ has no resemblance to a wadsett in any  
 “ of its clauses, and is only *a sale under*  
 “ *a reversion*, and therefore the claimant is  
 “ not entitled to be enrolled.

“ To this objection it was answered ; It  
 “ is clear, from the disposition from Mr.  
 “ Wemyss, that Mr. Dalrymple is a pro-  
 “ per wadsetter. It is not a disposition in  
 “ security, or relief, of a debt, which is  
 “ reprobated by the act of 1681 (1) ; for  
 “ in such a case the creditor must account  
 “ for his intromissions. But here the

(1) 3d Parl. Car. II. cap. 21.

“ claim-

“ claimant is not only entitled to draw the  
“ constant yearly profits of the lands, but  
“ also every casualty of superiority, how-  
“ ever much they may exceed the sum  
“ upon payment or consignation whereof  
“ the lands may be redeemed.

“ The meeting having heard and con-  
“ sidered the above claim, and instruct-  
“ ions (1) thereof, and the objection and  
“ answer, and the roll being called, and  
“ the votes marked, it was carried (60 to  
“ 58) to enrol Mr. Dalrymple; and the  
“ meeting ordered him to be enrolled ac-  
“ cordingly for the said lands of Powguild  
“ and Glenningstone, being 888*l.* Scots  
“ of valued rent.”

The disposition referred to in the fore-  
going extract, being the instrument creat-  
ing the estate by which Mr. Dalrymple  
claimed a right to vote, is here set down  
at full length.

(1) Proofs.

D I S P O -



## DISPOSITION,

James Wemyss, Esq; of Wemyss, to  
Hugh Dalrymple, Esq;

“ **I** James Wemyss of Wemyss, Esq; su-  
 “ perior of the lands and others un-  
 “ der-written : Whereas Hugh Dalrymple  
 “ of Fordell, Esq; has made payment to  
 “ me of the sum of 20*l.* sterling, for my  
 “ granting these presents, whereof I hereby  
 “ grant the receipt, renouncing all excep-  
 “ tions and objections in the contrary;  
 “ therefore wit ye me to have sold, annail-  
 “ zied, and disponed, as I, by these pre-  
 “ sents, sell, annalzie, and dispone, to and  
 “ in favours of the said Hugh Dalrymple,  
 “ his heirs and assignees, heritably, but re-  
 “ deemable always, and under reversion,  
 “ in manner after-mentioned, all and haill  
 “ the lands of Powguild and Glenning-  
 “ stone, with the haill parts, pendicles, and  
 “ pertinents thereof, tenants, tenantries,  
 “ and service of free tenants of the same,  
 “ all lying in the parish of  
 “ and shire of Fife, as the same are more

“ particularly described in the rights and  
“ infeftments thereof, with all right, title,  
“ interest, and claim of right, which I,  
“ my predeceffors, or authors, had, have,  
“ or any wife may have, claim, or pre-  
“ tend thereto, or any part thereof, in  
“ time coming : In the which lands I  
“ bind and oblige me to infeft and feife the  
“ faid Hugh Dalrymple, and his foresaids,  
“ upon their own proper charges and ex-  
“ pences, to be holden of our Sovereign  
“ Lord the King’s Majesty, and his royal  
“ fucceffors, in free blanch, for yearly pay-  
“ ment of the blanch-duties, and other  
“ duties, formerly payable by me for the  
“ faid lands, and that by refignation there-  
“ of ; and for that effect to make, grant,  
“ fubfcribe, and deliver, all writs requifite  
“ and neceffary : And for effectuating the  
“ faid infeftment by refignation, wit ye me  
“ to have made and constitute, as I, by  
“ thefe presents, make, constitute, and  
“ appoint

“ and each of you, conjunctly and feve-  
“ rally,

“ rally, my very lawful and undoubted pro-  
“ curators, to the effect underwritten;  
“ giving, granting, and committing to  
“ them, my full power and commission,  
“ to resign, surrender, upgive, overgive,  
“ and deliver, all and hail the said lands  
“ of Powguild and Glenningstone, with  
“ the hail parts, pendicles, and pertinents  
“ thereof, lying as aforesaid; together  
“ with all right, title, interest, and claim  
“ of right, which I, my predecessors, or  
“ authors, had, have, or any wise may  
“ have to the said lands, or any part there-  
“ of, in the hands of our Sovereign Lord  
“ the King’s Majesty, and his Highness’s  
“ successors, or of his commissioners having  
“ power to receive resignations, and grant  
“ new infeftments thereupon, in favours,  
“ and for new infeftment of the same, to  
“ be made and granted to the said Hugh  
“ Dalrymple, and his foresaids, heritably,  
“ but redeemable always, and under rever-  
“ sion, as follows, *viz.* Providing always,  
“ as it is hereby expressly agreed upon,  
“ That the lands and others above disposed  
“ shall

“ shall be redeemable, by me, my heirs  
“ and successors, from the said Hugh Dal-  
“ rymple and his forefairs, at the term  
“ of Whitsunday 1770 years, or at any  
“ other term of Whitsunday thereafter,  
“ by payment-making to them, or con-  
“ signation for their behoof, of the sum  
“ of 20*l.* sterling, upon premonition to  
“ be made to them forty days preceding  
“ the term of redemption, personally, or  
“ at their dwelling-places, in presence of a  
“ notary and witnesses, as effects; and in  
“ case of absence or refusal, the redemp-  
“ tion-money to be consigned in the hands  
“ of the cashier of the Royal Bank, or  
“ treasurer of the Bank of Scotland, upon  
“ the peril of the consigner; and the place  
“ of redemption to be within St. Giles’s  
“ church, at that place where the earl  
“ of Moray’s tomb is situated; and an ex-  
“ tract of these presents, or of the infest-  
“ ment to follow hereupon, shall be as  
“ good, valid, and sufficient, for using the  
“ order of redemption, as if a particular

“ reversion were granted on a paper  
“ apart, with all solemnities necessary ;  
“ acts, instruments, and documents, one  
“ or more, in the premisses, to ask, list,  
“ and raise ; and, generally, to do every  
“ thing thereanent which I could do my-  
“ self, if personally present, or which to  
“ the office of procuratory in such cases is  
“ known to appertain, promising to hold  
“ firm and stable whatsoever my said pro-  
“ curator does, or lawfully causes to be  
“ done in the premisses ; and I bind and  
“ oblige me to warrant, acquit, and de-  
“ fend, the lands and others above dis-  
“ posed, with this present disposition, and  
“ infestment to follow thereupon, to be  
“ free, safe, and sure, to the said Hugh  
“ Dalrymple, and his foresaids, from all  
“ perils, dangers, and incumbrances what-  
“ soever, at all hands, and against all  
“ deadly, as law will ; excepting always  
“ from the foresaid warrandice the feu-  
“ rights and dispositions of the property  
“ of the foresaid lands granted by me,  
“ my

“ my predeceffors or authors : And fur-  
“ ther, I by thefe presents, not only af-  
“ fign, transfer, and difpone, to the faid  
“ Hugh Dalrymple, and his forefaids,  
“ the whole writs, rights, titles, and  
“ fecurities, of and concerning the  
“ lands and others above difponed ;  
“ but alfo the feu-duties and other  
“ casualties of superiority, payable forth  
“ of the faid lands, from and after the  
“ term of Whitsunday next to come, and  
“ in all time coming during the not re-  
“ demption, as aforefaid ; turning and  
“ transferring the whole right of the pre-  
“ miffes, from me and my forefaids, to  
“ and in favour of the faid Hugh Dalrymple,  
“ and his forefaids, whom I hereby furro-  
“ gate and fubftitute in my full right and  
“ place thereof ; empowering them to up-  
“ lift and receive the faid feu-duties, to  
“ grant receipts, difcharges, and convey-  
“ ances of the fame, and, generally, to do  
“ every thing thereanent which I could  
“ have done myfelf, before granting here-  
“ of ;



“ of; which assignation I bind and oblige  
 “ me to warrant as follows, viz. in so  
 “ far as concerns the writs and evidents,  
 “ at all hands, and against all deadly, as  
 “ law will; and in so far as concerns the  
 “ said feu-duties, from my own proper  
 “ fact and deed alienarily, done or to be  
 “ done by me, in hurt and prejudice  
 “ hereof: And I have herewith delivered  
 “ up to the said Hugh Dalrymple the fol-  
 “ lowing writs, viz. Extract disposition of  
 “ the lands above disposed, by the de-  
 “ ceased James Earl of Wemyss, in my  
 “ favour, therein designed his third lawful  
 “ son, dated the 13th day of July, and  
 “ registered in the books of session the  
 “ 17th day of August, 1754 years; Char-  
 “ ter under the great seal, and instrument  
 “ of resignation thereon, both in my fa-  
 “ vours, dated the 6th of August, and  
 “ year last mentioned, and instrument of  
 “ feisin following upon the said charter in  
 “ my favour, dated the 15th, and regi-  
 “ strate in the general register of feisins  
 “ kept

“ kept at Edinburgh, the 20th day of  
 “ August, and year also last mentioned;  
 “ all to be kept and used by the said  
 “ Hugh Dalrymple and his forefaids, as  
 “ their own proper writs, in all time com-  
 “ ing. And I consent to the registration  
 “ hereof in the books of council and ses-  
 “ sion, or any other judges books compe-  
 “ tent, therein to remain for preservation;  
 “ and thereto I constitute

“ my procurators. In witness whereof,  
 “ these presents are wrote upon this and  
 “ the three preceding pages of stamped  
 “ paper, by Francis Strachan, clerk to  
 “ David Anderson writer to the signet, and  
 “ subscribed by me, at Wemyss-house,  
 “ the 6th day of May, 1766 years, be-  
 “ fore these witnesses, William Murdoch  
 “ and George Aedie, both my servants.

JA'. WEMYSS.”

*Will. Murdoch, witness.*

*George Aedie, witness.*

Mr. Dalrymple having been admitted on the roll, and his vote, of course (1), received, Mr. Henderson, and certain other freeholders of the county, preferred a petition and complaint, to the court of session, within the time limited by the statute of 16 Geo. II. cap. 11. § 4. (*viz.* 6 Feb.) praying that his name might be expunged; and the cause being argued, both at the bar and in printed memorials, or *factums*, according to the practice of that court, a decree was made, (7 March) by which the objections to the vote of Mr. Dalrymple were over-ruled, and the complaint dismissed. On this, a reclaiming petition (A) was presented, and, by that means, the cause was brought to a re-hearing but there had been no new decision, when the merits of the election came to be tried by the Committee.

The counsel for Mr. Henderson objected to the legality of Mr. Dalrymple's vote on two grounds.

(1) 16 Geo. II. c. 11. § 16.

I. They

I. They contended, That the estate created by the disposition from Mr. Wemyss, was a redeemable right, not within the exception of the statute of 12 Anne, stat. i. cap. 6, and, therefore, deprived of the right of voting, by that statute.

The preamble of the statute recites,

“ That of late several conveyances of  
 “ estates had been made in trust, or re-  
 “ deemable for elusory sums, no ways  
 “ adequate to the lands, on purpose to  
 “ create and multiply votes in elections  
 “ of members to serve in Parliament, for  
 “ that part of Great Britain called Scot-  
 “ land, contrary to the true intent and  
 “ meaning of the laws in that behalf.”

And, by § 3. it is enacted,

“ That no infeoffment taken upon any re-  
 “ deemable right whatsoever, (except *pro-*  
 “ *per wadsetts*, adjudications, or apprisings,  
 “ allowed by the act of Parliament relating  
 “ to elections, in 1681,) shall entitle the  
 “ person so infeofft, to vote, or be elected,

“ at any election in any shire or stew-  
 “ artry.”

II. In the second place, they contended, That the feisin given to Mr. Dalrymple, in consequence of the disposition from Mr. Wemyss, was, on the face of the instrument of feisin, void.

It appeared, by that instrument, that, agreeably to the forms of the Scotch law, (which retains, in a great measure, the ancient feudal solemnities in the conveyance of real property) one Robert Reid had acted as attorney for Mr. Dalrymple, and one John Morris as sheriff specially constituted for the purpose of performing the ceremony of delivering feisin, by virtue of the precept contained in the charter. That Reid, in the capacity of Mr. Dalrymple's attorney, had produced the charter, and precept therein contained, and had delivered them to Morris the sheriff, requiring him to perform his office. That the said sheriff had received the charter into his hands, and delivered it to the  
 notary-

notary-public, to be read and explained to the witnesses, which, accordingly, the notary did.—Then come the following words:

“ *Post cujus quidem &c. præfatus Robertus*  
 “ *Reid vicecomes in hac parte sibi inde*  
 “ *commissâ, statum & fasinam hereditariam,*  
 “ *sed redimabilem semper, & sub reversione*  
 “ *modo prædict. pariter & possessionem ædua-*  
 “ *lem, realem & corporalem, tetarum, &c.*  
 “ *aliaque supramentionat. dict. Hugoni*  
 “ *Dalrymple, per deliberationem terræ &*  
 “ *lapidis fundi dict. terrarum, in manibus*  
 “ *dict. Johannis Morris, tanquam a Ætor-*  
 “ *nati antedict. secundum tenorem dict.*  
 “ *cartæ, & præcepti fasinæ supra-insert.*  
 “ *inibi content. & dispensationes content.*  
 “ *indict. carta, dedit, tradidit, pariterque*  
 “ *deliberavit. Super quibus omnibus & sin-*  
 “ *gulis, dict. Johannes Morris, tanquam*  
 “ *æctornatus antedict. a me, notario publico,*  
 “ *hoc præsens publicum instrumentum, seu*  
 “ *plura publica instrumenta, sibi furi petijt.”*

The instrument imports, therefore, that Robert Reid, who appeared as attorney •



for Dalrymple, acted as *sheriff* in delivering seisin, and that John Morris, who appeared as sheriff, acted as *attorney* in receiving it (B).

These facts and circumstances were necessary to be stated previous to the arguments of the counsel, which were as follows :

#### COUNSEL for the petitioner.

Ist Point.] The statute of 1681, which is the ground-work of the laws concerning the election of the members for counties in Scotland, in ascertaining what sort of estates shall give a right to vote, specifies adjudications and apprisings, after the expiration of the legal reversion (*i. e.* the time within which it is competent to the original proprietor of the land to redeem it) and *proper wadsets* (1). No particular provision was then made, or thought necessary, to deprive *other* redeemable

(1) 3 Parl. Car. II. c. 21.

rights, or trust estates, of the right of voting. But, as a seat in Parliament grew daily more and more an object of ambition, or interest, it became a practice, among persons possessed of large estates, to parcel them out in portions of sufficient valuation to carry a vote, among their friends and dependents, but reserving to themselves a power by which, as soon as the turn was served, they might recal this shadow of property which they had conveyed away.

It is easy to see that the consequence of this abuse necessarily was, to throw the election of the members into the hands of a few men of overgrown fortunes; and they too were commonly peers. The evil was grown so exorbitant towards the end of the reign of Queen Anne, that the interposition of the legislature was necessary, to put a stop to it. Accordingly, a law passed, depriving all trust estates and redeemable rights whatsoever of the right of voting.—There was, however, an ex-

ception in favour of such adjudications and apprisings as were allowed by the act of 1681, and of *proper wadsets*. Adjudications and apprisings, after the law has precluded the original tenant from the power of redemption, are, in truth, no longer redeemable, and so the only sort of redeemable right to which a right of voting was allowed by the statute of Queen Anne, was a *proper wadset*. It will, therefore, be incumbent on the counsel for the sitting member, to shew that Mr. Dalrymple's estate is a *proper wadset*, in order to support the legality of his vote. They will, probably, not contend here, as was done in the court of session, that a *sale* under reversion, or, according to the expression of the Roman law, *sub pacto de retro vendendo*, the interest of the vendee in such estate being less, or not more, precarious than that of a wadsetter, is not within the spirit or meaning of the statute. The proper way to answer this would be to read the words of the statute; for it is impossible to under-

\*

stand

stand those words otherwise than that every redeemable right whatsoever, which is not a proper wadset, is thereby deprived of the right to vote.

It is not difficult to explain why the exception in favour of wadsets took place. Formerly, before the introduction of commerce, and the establishment of banks, almost the only way of raising money was by the impignoration of land, and the way of paying the interest of the debt was by suffering the lender to receive the rents. When he received them *unaccountably*, as the phrase is ; that is, when he was to trust to the rents for his interest ; to enjoy the benefit, if they exceeded the regular interest, and to undergo the loss, if they fell short, paying the public burthens at the the same time, then his estate was called a *proper wadset*. If, on the contrary, he was to account for the rents to the borrower, and only deduct his regular interest, when there was an excess, or receive what was necessary to make it up, when there was  
a defi-

a deficiency (as is the practice in the case of heritable bonds, the common form of landed security in modern times), then his estate was called an *improper wadset* (1).

There were many circumstances which contributed to continue the possession of estates, thus impignotated, in the hands of the wadsetter. As they were often pledged for their full value, it was hardly the interest of the *reverser*, for so the person entitled to redeem is called in the law of Scotland, to repay the sum and resume the estate. The scarcity of money made it difficult to raise, in any other way, what was necessary for that purpose. In the Highlands, as the wadsetters were generally persons belonging to the clan, and the reverser the chieftain, this sort of relation formed a bond of union betwixt them, which it would have been dangerous and impolitic to dissolve. By these means it happened, that, in 1681, and even at the

(1) Ersk. Fel. Inst. p. 301, 302.

beginning of the present century, a great deal of the property in Scotland was held in the form of wadsets, and, as the proper wadsetter was, while the estate continued unredeemed, in every respect the complete owner of the land, it was thought just, in 1681, to admit him, instead of the reverser, to vote for the commissioner of the shire, and, in the 12th of Queen Anne, to continue what had been provided in that respect by the former statute. But the case has altered extremely since that time. Wadsets of bare superiorities (1), when the act of Queen Anne passed, were totally unknown. Now, on the contrary, wadsets of any other kind are equally unknown. An example of a *bonâ fide* wadset of lands, as a security for money lent, or created for any other purpose but that of making a fictitious vote, scarcely exists at this day in Scotland.—The ancient wadsets continued longest in the

(1) *Vide supra*, vol. ii. p. 359. Note (B).



northern counties, for the reasons already given ; but the event of the last rebellion, and the measures since pursued, having in a manner put an end to the clans, the great men found it both safe and advantageous to redeem the remaining wadsets on their estates, which they accordingly did.

If the legislature had foreseen the gross abuse which was to be made of the exception in favour of proper wadsets, in the stat. of 12 Anne, no reasonable man can entertain a doubt, but that, at that time, they would have taken care, by a proper and explicit provision, to prevent it. But, as that was not done ; and as votes, for naked superiorities (1), and wadsets of superiorities, have been determined to be legal by the court of session, and the House of Lords, it is now, perhaps, too late, for any other authority but that of Parliament, to invalidate them. However, since votes of this sort are clearly fictitious, contrary to the true spirit of the act of Queen Anne,

(1) It was admitted that Mr. Dalrymple's estate was only the *superiority*.

and

and founded on a mere legal fraud, the Committee, who are the proper judicature for the interpretation of that act, will expect that a redeemable right of a superiority should appear evidently and indisputably to be a *proper wadset*, before they will determine that the holder of it is entitled to vote.

Besides the natural jealousy which this court ought to have of all attempts to invade the substantial rights of electors, by the creation of fictitious votes, the established rules of construction require particular strictness in deciding the present question. The general provision of the statute is, that no redeemable right in lands shall communicate a right to vote. From this general provision, proper wadsets are excepted. Now, it is a settled maxim of law, that, where there is a general provision and a particular exception, the provision shall receive as *large* a construction, and the exception as *strict* an one, as the words will bear.

But, when the nature and essential qualities of a proper wadset are explained,  
according

according to the authority of the best writers on the law of Scotland, it will be evident that they are entirely wanting to Mr. Dalrymple's estate, which is not a wadset, but a right by sale, under redemption.

A wadset being, as has been already mentioned, an *impignoration* of land, although there is perhaps no technical form of words necessary to constitute such a right, yet it must appear, from the instrument by which it is conveyed, that it is a *pledge*, and that the reverser and wadsetter stand in the relation of *debtor* and *creditor* to each other. Hence it must be stated, either that the land is *granted in wadset*; or that it is conveyed in consequence of *money advanced, or lent*; or it must be called a *security*; or the deed must contain a clause of *requisition*, empowering the wadsetter or lender to redemand his money. Such a power, particularly, is of the very essence of a *wadset*; and, if there is no direct clause to that effect, it must, at least, appear from the purview of the instrument. In short,

short, there must be words in it sufficient to ascertain the relation of borrower and lender between the two parties. Where *that* clearly appears on the face of the deed, words, otherwise importing a *sale*, will not prevent its being a *wadset*; but, if there is nothing importing such a relation, and words of *sale* only are used, then it is impossible to consider it as any thing else but a complete sale. This is exactly the case of the disposition to Mr. Dalrymple, which is in the form of a deed of sale, and contains none of the expressions just stated, nor others tantamount to them. There is in it a covenant for the delivery of all the title-deeds to Mr. Dalrymple. This is constantly the practice in the case of sales; but, in wadsets, the reverser retains the deeds, and only stipulates to deliver them, if required. In like manner, there is no covenant with regard to the payment of the expences attending the transaction, in cases of sale; and there is no such covenant in the deed in question; but, in loans, it is  
always

always provided, that the borrower shall pay the expences.

In Dallas's styles, we find the form of a proper wadset set forth, to which the disposition to Mr. Dalrymple bears no more resemblance than it does to a contract of marriage. The precedent in Dallas recites, that money had been *advanced* to the reverser, to enable him to pay his debts, in consideration of which he "*sells, annalsies, and disposes,*" &c. And, among other circumstances characteristic of a *loan* and *pledge*, there is, as well as the clause of redemption, a special clause of *requisition*, by which, if the wadsetter should chuse to call for his money, the reverser is bound to repay it, and take back his land (1).

In the same manner Lord Stair, in his Title of wadsets, considers them as pledges in security for money, and calls the reverser the *debtor* (2); and, from § 22 of that Title, it is evident that he con-

(1) Dallas, Styles, p. 709, to 718.

(2) B. 2. Tit. 10.

siders the power of requisition in the wadsetter or creditor as essential to a wadset.

In the Supplement to Spottiswoode's Styles, which is a book of considerable authority, we find the same idea of a wadset. The description there given of it is, that "It is a right whereby lands, or others passing by infestment, are *impignorated for the security of a special sum* (1)." After this definition, the form of a wadset is given, in which the estate granted is *called* a wadset, in the body of the deed; and it likewise contains an express clause of requisition.

[Ild Point.] By the law of Scotland, when an estate is conveyed from one to another, the charter granted by the superior to his new vassal must contain (2) what is called a precept of seizure; that is, a command from the superior to his *bailie*; or, where the superior is the King, to a sheriff

(1) Tit. iii. § 3. p. 139.

(2) By stat. 1672, cap. 7.



particularly constituted for that purpose (1), to give seizin of the estate to the vassal or his attorney, by the delivery of the proper symbols. The execution of this precept is certified by an instrument of seizin, *i. e.* the attestation of a notary-public, that possession was truly given in pursuance of the precept. The instrument of seizin recites the whole ceremony observed on taking the investment, which is as follows : First, the vassal, or his attorney, appears on the lands, and, delivering the precept to the baillie or sheriff, it is by him delivered, in the presence of witnesses, to the notary, who reads it; after which, the baillie, or sheriff, delivers to the vassal, or his attorney, earth and stone of the lands. Then the vassal, by himself or his attorney, *takes instruments* in the hands of the notary, (that is, requires an attestation of him,) before the witnesses, that he hath received seizin in due form. The instrument of seizin, contain-

(1) By stat. 1540, cap. 77. 1555. cap. 34. and 1606. cap. 15.

ing,

ing, as was just mentioned, the history of this transaction, being drawn up by the notary, he subjoins an attestation of the truth of the facts, and it is then subscribed by him and the witnesses.

From the form and solemnity of this writing, it is apparent, that it is, and is intended by the law to be, the only evidence of the seizin ; and, whenever any palpable defect or absurdity in the manner of giving the seizin is stated on the face of the instrument, it must be inferred that the seizin so given was void ; and that the new vassal never was put into *legal* possession of the estate. Now such an absurdity does appear on the face of the instrument of seizin in the present case ; for it recites that Robert Reid, who was Mr. Dalrymple's attorney, and ought to have received seizin from John Morris, the sheriff, delivered seizin to Morris ; that is, the intended vassal delivered the symbols of possession to the superior. It is manifest, that such an act could not vest the possession

in a man, who, not being seized, was to have received seizin from his intended superior. In short, the whole transaction was a mere nullity. That there are advantages attending the feudal forms of changing the possession of lands, is generally admitted even by the lawyers of this country (1), where they have in a great measure fallen into disuse: Be that, however, as it may, while they continue part of the law of Scotland, they must be adhered to, because a deviation from them in one instance, would be a precedent for relaxation in others, and, in the end, would beget the utmost confusion and disorder.

As Mr. Dalrymple, therefore, does not appear ever to have had legal seizin, or possession of the estate, his vote must be disallowed on that ground, even if the estate, meant to be conveyed to him, had been of such a nature as would have entitled him, when seized, to the privilege of voting.

The late decision of the court of session on this subject, though it will not be

(1) Bl. vol. ii. p. 337. 342.

pretended that it can bind the concurrent and superior jurisdiction of this Committee, may perhaps be urged as an authority which ought to weigh here; being the judgment of a court competent to the trial of the cause, and conversant in questions of this sort. To obviate any advantage the counsel for the sitting member may hope to derive from it in that light, it will only be necessary to relate the manner in which the judgment was given, and what passed in the court, on the occasion.

(☞ Here the counsel for the sitting member insisted, that it was improper to go into the history of what had passed in the court below, as it depended upon facts, which could only be proved by evidence; and that such evidence would be incompetent, as entirely immaterial to the cause. The counsel for the petitioners answered, by saying, that they did not mean to produce evidence of those facts, but merely to state them as matter of argument, agreeably to the constant practice in courts of

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justice,

justice, when it is thought necessary to invalidate the authority of any case, by an account of particular circumstances attending the determination.

The Committee over-ruled the objection, and directed the counsel for the petitioner to proceed.)

When the cause came to be decided at Edinburgh, there were but 11, of the 15 judges, present on the bench. The lord president being absent, the senior judge, by the constitution of the court, was to preside, and had the right of a casting vote in case of an equality\*. It happened, that the judge, to whom that province then fell, had voted for the sitting member at the election; that is, he had done what amounts to the same thing; for he, and another voter, in the interest of the petitioner, had agreed both to be absent. It is evident, from the act of Parliament under which

\* In the court of session, the president, or judge presiding in his room, has no vote, unless when the other judges on the bench are equally divided.

the Committee sits, that the sense of the legislature is, that persons having voted at an election, ought not to sit in judgment upon the merits of such election. Such a person, if a member of Parliament, is, by the statute of 10 Geo. III. cap. 16. (1), expressly excluded from being chosen of a Committee, appointed to try the merits of any petition complaining of the election at which he had given his vote. However, as there is no direct provision to prohibit a lord of session, who votes at an election, from acting as judge in a cause on the decision of which the fate of the election is, in the event, to depend, the gentleman alluded to, not only concurred in the judgment, but, in fact, determined the cause, by means of his casting vote. Both points having been argued at once, several of the lords delivered their opinions; and that judge expressed himself in such a manner, that the by-standers, who heard him, un-

(1) § 6.



derstood, that he did not think Mr. Dalrymple's estate a proper wadset. When the votes came to be collected, the question should have been general, in the terms of the petition, to this effect, " Shall Mr. Dalrymple be expunged from, " or continue on, the freeholders roll." But, it being proposed that separate questions should be put on each of the two points, *that* extraordinary method was adopted; and, the first question being, " Whether the seizin was valid or void," it was determined to be valid, by a majority of six to four. Then the second question was put, on the validity of the objection to the estate of Mr. Dalrymple; and, there being a division of five to five on that point, the presiding judge gave his casting vote in favour of Mr. Dalrymple; contrary to the sentiments he was understood to entertain when he delivered his opinion. Upon comparing the votes on the two questions, it appeared that an unquestionable majority of the lords, thought (some, because  
the

the estate was not, in their opinion, a proper wadset; some, because they considered the seizure as void) that Mr. Dalrymple had no right to be on the roll. Yet, by a strange solecism, arising from the making separate questions on the two points, when the general question came to be put, the following interlocutor was pronounced :

“ The lords having considered this petition, and complaint, &c. repel the objections, and dismiss the complaint.”

The impropriety of this mode of deciding a cause, cannot escape the Committee; and the numerous and gross inconveniencies which would flow from it, will occur, without being particularly pointed out. The business of a court of judicature is, to determine the rights of the parties to the suit, not to moot, and decide, abstract points of law; but, according to the method adopted in this case, it is evident, that a party might have the whole court, without one dissenting voice, in  
his

his favour, and yet the judgment be given for his opponent. Every separate argument might be made the ground of a separate question; and, if there were 11 points or arguments, 11 judges, and a single judge against the opposite party on each point; and therefore, each of the 11, upon a *general* question, obliged in conscience to vote against him; yet, 10 being for him on each *separate* point, the decision would be in his favour. The courts of law in England, aware of this manifest absurdity, never separate the points of a cause, when they come to give judgment; but, each judge acting upon his own reasons, and delivering those reasons, if he so thinks fit, the judgment is given, *generally*, for the plaintiff or defendant (C).

COUNSEL for the sitting member.

In order to enter properly on the present argument, it will be of use to trace, in a few words, the progress of the jurisdiction for the trial of questions concerning the  
election

election of commissioners for shires in Scotland.

In 1597, by a statute of that year (1), it seems to have been the intention of the legislature of that country, to give some degree of judicial power, with regard to elections, to the lord Register, for he was, thereby, authorized to reject commissions (*i. e. returns*) which appeared not to be properly executed. There is no account, however, to be found in the records, of his ever having executed that authority; nor, indeed, can any vestiges of controverted elections be discovered, before the act of 1681 (2) put the rights of election, and every thing relating to that subject, on a new footing. From that time, all disputes concerning titles to vote, were, in the first instance, to be tried in the meeting of freeholders; and, if the parties were not satisfied with their decision, they were to be then carried to Parliament. The Parliament of Scot-

(1) Cap. 276.

(2) Cap. 21.

land being a court of common law, there was no impropriety that such disputes should be tried there, even when they did not affect, or arise on the occasion of, any particular election.—At the same time, a subsidiary jurisdiction was bestowed on the court of session when the Parliament happened not to sit, which, in those days, was frequently the case.

Thus the law continued till 16 Geo. II. when a new jurisdiction was bestowed on the court of session, the former having been, in a manner, annihilated by the frequency of Parliaments after the Union.—It is remarkable that the statute, giving this new jurisdiction, says nothing about the House of Commons. It has, therefore, been a matter of doubt, whether that member of the legislative body possesses the appellate authority, which was formerly lodged in the Scotch Parliament, relative to the qualifications of freeholders. In the case of Clackmannan, determined last year, the Committee thought that they  
were

were bound by the limitation in the statute of 16 Geo. II. cap. 11. (1). It may be questioned whether they were, or were not, right, in that opinion; however, according to their resolution, it must follow, that Committees are equally bound by the whole of the act; and, therefore, it deserves the consideration of the present Committee how far they can, consistently with the uniformity of decision, entertain the present question concerning Mr. Dalrymple's vote, after a judgment of the court of session.

One of the provisions of the statute of 1681 was, that no objections to a freeholder's being on the roll should be competent in the appellate jurisdiction, which had not been taken, and stated formally in writing, in the court of freeholders. The point of the supposed defect in Mr. Dalrymple's seizure, was never mentioned at the election-meeting; nor was it inserted in the petition and complaint, nor ever started in the court of session, till the coun-

(1) *Supra*, vol. ii. p. 358.



fel for the petitioner mentioned it, *ore tenus*, on the day when the cause came to be decided. If, therefore, the above-mentioned provision were still in force, that point could not have been brought, by any complainants, either before the lords of session, or the present Committee.

By sect. 4. of 16 Geo. II. cap. 11. the power of complaining of a person's being on the roll is given to freeholders, though *not present* at the Michaelmas or election meeting (1). It is a fair inference from this clause, that it is competent to *absent* freeholders to make objections not started at such meeting, and, with regard to *them*, therefore, the court of session has been in the right in construing this clause as a repeal of the provision of 1681, and as giving themselves an *original* jurisdiction on the complaints of such persons. But is it not straining the statute of 16 Geo. II. to extend it to the complaints of freeholders,

(1) *Supra*, vol. ii. p. 353, 354.

who

who were *present* at the meeting, so as totally to repeal part of the act of 1681 by nothing else but mere implication?—If that statute is still in force, with regard to freeholders *present* at the meeting, the question concerning the seizure was not, at the time it was made, competent to the court of session (1).

There is another reason why it was not then competent to them. By the statute of 16 Geo. II. c. 11. § 4. it was enacted that the person complained of should have 30 days notice of the complaint, which term is now reduced to 15 days by 14 Geo. III. cap. 81. § 1. But, in the present case, there was not time to comply with this rule, or give the proper notice, as to the complaint concerning the seizure, and therefore, on that ground, the court of session ought not to have gone into it.

We ought, therefore, to look upon it as never having been before them, and, if this reasoning is just, the decision *must*

(1) Mr. Henderson, and the other complainants, were admitted to have been *present* at the election-meeting.

have

have been in favour of Mr. Dalrymple, even if there had been but one question put, in the manner contended for by the counsel for the petitioner.

But, at all events, as the question concerning the title came before the court of session, on an appeal from the court of freeholders, and the other question, as a matter of original jurisdiction, it was peculiarly incumbent on the court of session to separate the points. Indeed, the practice, so far from being extraordinary, is very common in that court, of which numberless proofs might be given (1).

When that mode of proceeding ought to prevail, and when it ought not, must depend on the particular circumstances of the case; but it would be easy to put cases, where a degree of injustice and absurdity would be the consequence of not separating the questions, equal to what the counsel on the other side suppose necessarily to follow from separating them. If,

(1) Several instances were mentioned, *vide infra*.

for instance, in the present cause, the question had been put *generally*, and the decision had been to expunge Mr. Dalrymple from the roll, still, as it happened, a majority of the court would have thought that his estate was a proper wadset, and a majority also would have thought his seizure good; and, if two different causes had come afterwards to be tried, in one of which the sole question was on a wadset like the present, and, in the other, on a seizure also like the present, the majority of the court in each of those causes must have decided in favour of the defendant, though the *necessary* inference from their decision in Mr. Dalrymple's case would have been, either that his estate was not a proper wadset, or that his seizure was void.

Committees of elections follow this method, of splitting a cause into separate questions, every day; and even the present Committee has done so, at the desire of both parties, by resolving to decide upon Mr. Dalrymple's vote and Mr. Melvill's, dis-

tinctly from Mr. Loch's (1), although the general question for them to determine is, Whether Mr. Oswald or Mr. Henderson is duly elected.

As to the observations which have been made on what fell from the presiding judge in the court of session, when he gave his opinion, he was, undoubtedly, misunderstood by the friends of the petitioner, who, wishing to hear him deliver sentiments favourable to their cause, interpreted certain metaphorical expressions in a sense in which they certainly were not meant.

Upon the whole, therefore, what has been said, to diminish the weight of the decision in Scotland, being removed, the Committee, no doubt, will give to that decision all the authority it merits as the judgment of a court competent to, and conversant in, such sort of questions.—It is now fit to give some answer to what has been said on the two points.

(1) The voter whose right was disputed on the part of the sitting member.

Ist Point.] The whole of the reasoning of the counsel for the petitioner, on this point, proceeds on *data* which are not true. They suppose that there must be a borrower and lender, a loan and debt, to constitute a wadset. Now this is not so. A wadset may be created without a loan; it may be a security for a gratuitous gift; and it was, in former times, when money was scarce, the common security for the portions of younger children.

There is nothing, in the very authors they have cited, which confines a wadset to a security for a loan. Both Lord Stair, and the author of the Supplement to Spottiswoode, call it merely a *security*, and do not say a word about *loan*. Stair's Instit. B. ii. tit. 10. Preamble. Suppl. to Spottisf. p. 139. Neither is there any mention of a *loan* in the description of a wadset given by Sir George Mackenzie. Instit. lib. ii. tit. 8. § 3.

The notion that a power of requisition is necessary to constitute a wadset,



is founded on the idea of a loan, but, in cases where a wadset is given to a son, in security for his portion, such a power cannot be supposed; and, indeed, though a clause of requisition is found in many of the more modern precedents, yet it is so far from being essential, that, in the earlier periods of the law of Scotland, no such clause was ever introduced, because it was never the interest of the wadsetter to restore the land, and take back his money. Lord Stair was, in 1681, president of the court of session, so that he must be understood to have been acquainted with the meaning of "*proper wadset*" in the statute of that year, and he, in the Title just cited, § 2. has these remarkable words:

"The ordinary wadset is by infestment of  
 "property, or of annual-rent, the concep-  
 "tion whereof is not under the name of im-  
 "pledging, impignoration, hypothecation,  
 "or the like, but in the terms of *disposition*,  
 "or infestment, whereby the property of  
 "the thing wadsetted passeth, and is esta-  
 "blished

“ blished in the wadsetter : but, under *re-*  
 “ *version* to the constituent, whereby it hath  
 “ two parts ; the *infestment*, and the *re-*  
 “ *version*. The *infestment* in wadsets is, in  
 “ all points, like to other infestments,  
 “ whether they be infestments of property,  
 “ or of annual-rent, or whether they be  
 “ public, holden of the constituent’s su-  
 “ perior, or base, holden of the granter  
 “ himself ; *so that all the specialties of wad-*  
 “ *sets resolve in the reversion.*” That is, the  
 reversion, or power of redemption, is the  
 only essential characteristic of a wadset ;  
 and the distinction between a proper wad-  
 set and a redeemable sale, or a sale *sub pacto*  
*de retrovendendo*, is, that, in the former, the  
 grantor may redeem at any unlimited time ;  
 in the latter, he only can within a particu-  
 lar period.

Here we find, in Lord Stair, the Lord  
 Coke of Scotland, what overthrows the  
 whole system of the counsel for the peti-  
 tioner. We are told, by that great judge,  
 that no marks of impignoration are re-  
 Q 3                      quired,

quired, and that the reversion is the only necessary characteristic.—As to the passage they have cited from him (1), he does not at all say there, that the power of requisition is essential; he only mentions *that*, among other methods, which he is enumerating, whereby a wadset may be destroyed. Sir G. Mackenzie (2), informs us, and it is well known,† that wadsets formerly consisted of two distinct instruments, the reversion being secured to the grantor by a separate deed, but neither does he mention the clause or power of requisition, as making part of either of the deeds. Craig's authority, *lib. ii. dieg. 6. § 27*, entirely coincides with that of Lord Stair and Mackenzie's.

The doctrine of the petitioner's counsel is not less contradicted by decided cases, than by the opinions of the best authors.

The case of Mr. Munro of Culcairn, determined by the court of session, in 1745,

(1) *Supra*, p. 208, 209. (2) *Lxc. cit.*

is exactly in point to the present. That gentleman obtained a charter, and was in-  
feft, and afterwards inrolled, as a free-  
holder of the county of Ross; but a com-  
plaint was preferred against him, object-  
ing, that his right was not a *proper wad-*  
*set*. An interlocutor being pronounced in  
his favour, a most elaborate reclaiming  
petition was prepared by his counsel, a  
lawyer of very eminent abilities. It was par-  
ticularly insisted, That his estate appeared,  
by the charter granted to him by his fa-  
ther, to be destitute of certain necessary  
requisites common to all wadsets, both  
proper and improper; namely, that there  
should be a borrower and lender, a debtor  
and creditor, a sum specified to be advanced  
by the wadsetter, and a clause of requisiti-  
tion, empowering him to demand his mo-  
ney. Yet this reclaiming petition was  
dismissed by the court, without any an-  
swer being put in by the opposite party.—  
The recital of the disposition by Mr.  
Monro's father only alleged the grant to

be made "*for certain onerous causes, and considerations moving him,*" without saying a syllable of any loan or advance of money; and the words "wadset, or pledge," never occur in it, but, instead thereof, the common terms of a deed of sale.—When this case was cited in the court of session, the answer given to it, was, "The decision is wrong;" A very easy way, to be sure, of getting rid of a stubborn authority. But what shews that, at the time, it was not thought wrong, is that it was never appealed from to the House of Lords, but was acquiesced in by the losing party.

In the case of Galbraith against Cunningham, determined the 17<sup>th</sup> of January, 1755, the objection was, that there was no power of requisition; but that too was overruled. The answer given below to this case was, "That it is not fully reported (1);" but of this no manner of proof was adduced.

(1) Decisions of the court of session, from 1752 to 1756, p. 186 to 188.

The case of John Stirling, Esq; against Archibald Campbell, Esq; (father to one of the counsel for the petitioner) turned upon a question concerning what was essential to constitute a proper wadset. It was determined, in the court of session, 6th March, 1754 (1), and, on an appeal, the decree was affirmed in the House of Lords, 2 April, 1754 (2). In the reasons for the respondents, in this case, a description of a proper wadset is given, which corresponds entirely with the disposition in favour of Mr. Dalrymple.

(☞ The counsel read part of the reasons from the printed Case )

To the authority of the best writers, and of the cases cited, we shall be able to add the testimony of a very eminent conveyancer in Scotland, who will prove, that

(1) Decisions of the court of session, from 1752 to 1756. p. 152 to 155.

(2) Cases in the House of Lords.



the deed of conveyance to Mr. Dalrymple is perfectly consonant to the *formula* he makes use of, when he is employed to draw a proper wadset (1).

[Ild point.] If the reasoning in the foregoing part of the argument is conclusive, it is as little competent to the Committee, now, to go into this point, as it was to the court of session, when the cause came before them. However, upon examination, the question will appear to be founded on an objection which cannot prevail before any tribunal.

In Scotland, there are forms, or precedents, ready made, of instruments of kiffin, as there are of bonds and other legal instruments, in this country; and they are always drawn with blanks for the names of the special attorney and baillie or sheriff, that they may be filled up as the occasion requires.

(1) *Vide infra*, p. 240.

Before the statute of 1617, cap. 16, for the registration of feifins, greater accuracy was required with regard to the execution of the precept, that being, at that time, the only means of securing the notoriety of the infeftment. Hence, in the earlier decisions on defects of form in the livery of feifin, greater strictness was necessary, and was observed, than since the establishment of registers. From that period, the proper and surest evidence of the infeftment has been, the register; and the court of session, and particularly the House of Lords, have, of late years, been much less scrupulous with respect to mere clerical mistakes in instruments of feifin. In the present case, if the blanks had not been filled up, there is no doubt but the feifin would still have been valid; and, this being so, according to the maxim of "*superflua non nocent*," the error in writing one name for another, in some of the blanks, cannot vitiate what would have done without any name at all.

Cases,

Cases, where objections founded on similar mistakes, have been over-ruled, might be cited in great number: Some, where the mistake was with regard to the proper *symbol*; others, where it regarded the *place* of the infestment; and others, again, where it was, as here, in the *name*.

In the case of Gordon of Hallhead against Brodie, and others, there were two objections. 1. That, in the instrument of seisin, the notary had not declared, that the baillie had used the proper symbols, for the instrument only mentioned, "*earth and stone* FOR *the lands*," without saying "*OF the lands*." 2. That no mention was made, that *separate* infestment had been given for lands stated to be *discontiguous*, though the law requires separate infestment in such a case. The court of session over-ruled both objections; and, on a reclaiming petition, adhered to their first decree.

The

The case of Douglas of Douglas against Chalmers, was shortly this. Robert Chalmers and John Crawford were to receive seisin of certain lands, the first as *life-renter*, (*i. e.* tenant for life) the second as *fiar*, (*i. e.* remainder-man in fee (1)). John Wilson appeared as attorney for both; and the instrument of seisin set forth, That the baillie “ *Statum & seisinam bere-*  
“ *ditariam, pariter ac possessionem actualem,*  
“ *realem, & corporalem, dict. Joanni*  
“ *Crawford, hæredibus suis & assignatis*  
“ *quibuscumque, hereditarie & irredimabili-*  
“ *ter totarum & integrarum, &c. per*  
“ *traditionem terræ & lapidis, &c. dicto*  
“ *Joanni Wilson, tanquam actornato pro et*  
“ *in nomine dict. Roberti Chalmers, et*  
“ *Joannis Crawford, pro respectivis eorum*  
“ *juribus, vitalis redditus et feodi antemen-*  
“ *tionat.*”

(1) The estates of life-renter and fiar, bear a pretty near resemblance to those of tenant for life, and remainder-man in fee.—There are, however, many particulars in which they differ.

Here

Here the name of the life-renter was omitted, in writing out the instrument of feisin; and, although the giving possession to the party is the very essence of the feisin, the objection, after having been, at first, allowed by the court of session, was, on a reclaiming petition, and a better consideration of the question, over-ruled.

There is an old case reported by Dirleton, (Hilton against Lady Chynes, 214: Tit. 1676,) “Where, a feisin being objected  
“to, because it stated both the baillie and  
“attorney to be the same person, who  
“could not *give* and *take* infeftment; the  
“court of session, in respect it did appear  
“evidently, that it was a mistake of the  
“notary, seeing, by the first part of the  
“feisin, it was clear, there was a distinct  
“attorney, who did present the feisin to  
“the baillie, did therefore incline to sustain the same.”

In the case of Livingstone against Lord Napier, there was the following mistake  
in

in the instrument of feisin. In the first part, John *Bryce* was stated as attorney, or procurator, and, afterwards, it was said, that possession, &c. had been given, by deliverance to the said John *Burn* (a name not mentioned before) as procurator for, &c. of earth and stone, &c. An objection taken on this ground was over-ruled by the court of session, and, on an appeal, by the House of Lords (1).

4th March, 1768, The House of Lords reversed a judgment of the court of session, in the case of Ogilvie against Skene and Hunter, where that court had held a feisin void, because the instrument did not state, that *distinct* feisin had been given for the different parts of *discontiguous lands*.—It is observable, that, both in this, and the foregoing case of Livingstone and Lord Napier, the points were separated (D).

In a very late instance, where the validity of certain votes carved out of Lord

(1) 3 Mar. 1762.



Fife's estate was called in question, both in the court of session and the House of Lords, it was so well understood that objections of the present sort had no chance of success, that, although the votes were very liable to such objections, and all other sorts of points were made, no notice was taken of the mere formal defects in the instruments of seisin.

☞ To show, that the form of Mr. Dalrymple's disposition was similar to other precedents of proper wadsets; used in the present practice, one Mr. Mitchelson, a considerable conveyancer at Edinburgh, was produced as a witness, by the counsel for the sitting member. But, as deeds drawn by conveyancers, if not brought into a court of justice, and confirmed by a legal determination, can be of no authority, I have thought it unnecessary to give any account of his evidence.

COUNSEL

COUNSEL for the petitioner, in reply.

If the Committee were to hold that they have no jurisdiction in the present case, the obvious consequence would be, to throw the whole right of deciding upon the seats of the members of the House of Commons for Scotland, into the House of Peers. But such a doctrine cannot be seriously maintained.

It is natural to suppose, that this court will be more scrupulous and jealous interpreters of the laws against fictitious votes, than the House of Lords. While that House has, in deciding upon appeals, shown a great latitude on questions of this sort, the House of Commons, on several occasions, has discovered a very different spirit. Thus, in the case of the county of Dunbarton, 23 Jan. 1724-5, they opposed an attempt to multiply votes, by granting undivided shares of the same superiority, by two resolutions, which are to be found in the Journals (1). This case is

(1) Journ. vol. xx. p. 378. col. 2.

cited, not from any similarity of the point to that in the present cause, but for the sake of the principle; and to show that, if they can, the Committee ought to set aside a vote which is clearly fictitious, and against the spirit of the acts for securing the freedom of elections.

It has been said, that a loan is not necessary to the idea of a proper wadset: Perhaps it is not; but certainly there must be a debtor and creditor, to constitute a wadset, and a wadset must be a pledge in security for a debt. There are ways of constituting debts without loan, as in the case of a provision for a younger son. There, although the younger son does not lend the money for which he obtains the wadset, yet undoubtedly the reverser is his debtor for the sum, and he holds the land as a pledge for the security of it.

Thus Lord Stair, and the author of the Supplement to Spottiswoode, describe a wadset as a security; and this is admitted to be a proper description by the counsel  
on

on the other side. But can it be contended, that, in the present case, there is any thing characteristic of a security? What is the sum advanced? Only twenty pounds. Yet, if this is a *bond fide* transaction, the wadsetter, as superior, is entitled to a year's rent of the lands from every new *singular successor*, (*i. e.* purchaser, according to the legal sense of that word in English) and the rent of the estate is about 400 *l.* a year. Will it be imagined, or can a court of justice intend, that a man of Mr. Wemyss's fortune, would pledge so valuable a property for the sum of twenty pounds.

One of the counsel on the other side alleged, that the distinction between a proper wadset and a redeemable sale, is that, in the first, the power of reversion is perpetual, in the latter, limited to a certain time (1). But in this he is mistaken. The parties to a sale may annex any condition to it they please; and, in fact, the rever-

(1) *Supra*, p. 229.

sion in wadsets is often limited; and, in fictitious sales, such as the present, it never is.

To the authorities already cited, may be added that of the legislature of Scotland, to show that wadsets depend on the idea of a debtor and creditor. By the statute of 1661. cap. 2. which is entitled, “An act for ordering (*i. e.* regulating) the payment of debts, betwixt creditor and debtor;” the wadsetter is expressly called the *creditor*, and the heritor (or reverser) the *debtor*.

In the Historical Notes of Lord Kaimes, annexed to his abridgment of the statutes, he observes, on the act of 1769, cap. 27. “that though a *wadset* is a redeemable right, it is very different in its nature from redeemable sales, mentioned in that statute. In a *wadset*, whether the land be held of the superior or the grantor himself, no more is understood to be conveyed than a *pledge*, or real security for money (1).”

(1) Note 16. p. 439, 440.



With regard to the cases cited, they do not apply. The deed, in the case of *Monro*, was made in 1707, before the statute of 12 Anne, and, as that statute had no retrospective effect, the vote of Mr. *Monro*, though founded on a redeemable sale, was not affected by it.

In *Galbraith* against *Cunningham*, the only objection was, the want of an *express* clause of requisition. To this it was answered, that there was enough on the face of the deed to *imply* a power of requisition; and the petitioner admits, that such implication is sufficient. It has been thought prudent to make only a partial quotation from the case of *Stirling* against *Campbell*, because that case, taken altogether, makes directly against Mr. *Dalrymple's* vote, and shows that the usual form of a proper wadset is something very different from the deed of Mr. *Wemyss* in his favour.

In the printed answers to the reclaiming petition, are cited as instances of proper



wadsetts, although they contain no power of requisition, expressed or implied, a number of grants for the purpose of voting, particularly those carved out of Lord Fife's estate. But, as to them, it is to be observed, that though they were the subject of litigation, both at Edinburgh and in the House of Lords, the present point was not once agitated.

In short, there is no decision or case in point to support Mr. Dalrymple's vote; and there is a very late judgment of the court of session directly against him; namely in the case of Mr. James Hamilton.

Sir Archibald Edmonstone conveyed an estate for the purpose of giving a qualification to vote, to his brother Captain Edmonstone, in life-rent, and James Hamilton, Esq; in tail-male. In the disposition there was this clause: " Redeemable  
 " always, and under reversion, the said  
 " lands, &c. in so far as concerns the  
 " fee thereof, &c. from the said James  
 " Hamilton, the fiar, and the heirs male  
 " of

“ of his body, by payment to them, or  
“ lawful consignation for their behoof, of  
“ the sum of 10 marks Scots, at and upon  
“ the term of Whitsunday next, 1772, or  
“ at any other term of Whitsunday, or  
“ Martinmas thereafter, &c.”

Here, although the right of redemption was perpetual, and all other requisites of a proper wadset were to be found in the deed, yet because, as in the present case, there were no words giving a right of requisition, neither expressly nor by implication, the court of session, after having at first over-ruled the objection to the vote, on more mature consideration, ordered Mr. Hamilton to be expunged from the roll.

The authorities cited, in answer to the second objection, are none of them directly in point: if they were, there are others to oppose to them, where blunders like the present have been held to be fatal. The Committee will therefore think themselves

at liberty to exercise their discretion, and will be glad to have it in their power to lay hold of any defect in point of form, in order to set aside a vote so clearly fictitious as that of Mr. Dalrymple. The cause of Livingstone and Lord Napier comes nearest the present; but there is this material difference, that the only mistake *there* was in one of the surnames, an imaginary one, "*Burn*," being substituted instead of "*Bryce*;" but the Christian name was not mistaken; and that alone, prefaced by the relative "*said*," was a sufficient description of the person.

In the case of MacLeod of Cadboll, &c. against Ross of Priesthill, &c. determined so lately as 18 Feb. 1768, Sir John Gordon conveyed to Ross in liferent, and to Gordon in fee, three parcels of land. 1. Part of Easter Aird and Easter Tarbat. 2. Part of the lands of St. Martin's. 3. Part of the estate of Meickle Tarrel. In the instrument of seizin, the notary only mentioned that infeftment had been given of the lands  
of

of Easter Aird, Easter Tarbat, and St. Martin's. He neglected to mention Meickle Tarrel. This defect did not occur to the parties, or their counsel; but, being mentioned from the bench (E), it was allowed by the court, though there was the greatest reason to imply, from the latter part of the instrument, that infestment had been given of the whole lands; for it concluded thus:

*Acta erant hæc super fundum omnium & singularum partium seu portionum prædictarum terrarum de Easter Aird, Easter Tarbat, et MEICKLE TARRELL, respectivè & successive, &c. (1).*

When the counsel for the petitioner had finished, the counsel on the other side, having a right to observe on the new authorities they had produced, took notice, that the case of Dunbarton, in the Journals, had no kind of analogy to the present

(1) Wight on Elections, p. 207, 208. If there is no mistake in this quotation from the instrument of seizin, in Mr. Wight's book, the lands of *St. Martin's* must have been omitted in this part of the instrument.

question, and that even that of Hamilton did not apply to the present case; for that the lands were, in that case, conveyed to one person in liferent, and to another in fee; which was a very anomalous right, and inconsistent with the nature of a proper wadset. That it was an absurdity to create a liferent upon a right redeemable at Whitsunday, 1772, or any subsequent Whitsunday or Martinmas. That it was likewise an absurdity, for the fiar to claim a vote as a *wadsetter*, when he neither did, nor could, draw any profits from the estate, during the life of the liferenter; and that it must be presumed that those were the grounds on which the judgment turned, in that case.

The CASE of William Melvill, Esq; of Griegston.

At the election-meeting for the county of Fife, 2 Jan. 1752, William Melvill, Esq; was enrolled as a freeholder, " in  
 " right of his wife, Margaret Bonnar of  
 " Grieg-



“ Griegston, who was heiress of entail  
“ of the lands of Griegston, and stood  
“ infest therein by virtue of a charter from  
“ the Crown, in favour of the said Margaret,  
“ and the deceased Thomas Graham, her  
“ first husband, dated 31 Jan. 1724, and  
“ of seisin following on the said charter,  
“ registered in the general register, 19  
“ March, of the same year.—The lands  
“ appeared, by the valuation-books, to  
“ amount to 461*l.* of yearly valued  
“ rent.”

By the statute of 1681. cap. 21. Husbands are entitled to be enrolled, and to vote, for the freeholds of their wives, (though they have no infestment in their own person,) if the wife is infest (1).

At the last election-meeting, when the roll came to be revised, an objection was taken to Mr. Melvill's continuing upon

(1) Wight, p. 216.



it. The proceedings on the occasion are thus entered in the minutes.

“ Then Mr. Niel Ferguson gave in the  
 “ following objection in writing, *viz.*  
 “ I Niel Ferguson, advocate, object to Mr.  
 “ Melvil of Griegston, That he is denuded  
 “ of the title upon which he stood upon  
 “ the roll, his wife, in whose right he  
 “ was inrolled, having dispoed her estate  
 “ to her son Capt. Graham of Greigston,  
 “ who is in possession of the same, and sets  
 “ tacks (1) as fiar, and draws the rents; in  
 “ evidence of which a tack is herewith  
 “ produced.—And he is called upon to say,  
 “ if this is not the fact.

“ (Signed) NIEL FERGUSON.”

“ And the said Mr. Melvil being present  
 “ in court, and being enquired, if he  
 “ would make answer to the objection?  
 “ refused to make any, but was willing to  
 “ take the oath of trust and possession:  
 “ And Mr. Cunninghame answered to the

(1) Leases.

“ objection,

“ objection, That the objection was not  
“ relevant, and could not be proved by any  
“ other evidence than a deed under his  
“ (Graham’s) own hand, and a deed un-  
“ der the hand of a third party was no  
“ proof against him.

“ And the vote being put to expunge  
“ William Melvil, or not, and the roll be-  
“ ing called, and votes marked, it was  
“ carried (62 to 27) not to expunge him.”

To support the objection, a lease was produced at the meeting, granted by Captain Graham, in which he described himself as heir of the estate, and entitled to make leases during his mother’s life.

A petition and complaint was presented to the court of session, complaining of this decision of the court of freeholders, at the same time with the complaint against Mr. Dalrymple’s vote. The objection in the complaint was the same as that taken at the election-meeting. It was over-ruled by the unanimous opinion of the judges.

The

The deed, by which Mr. Melvil was alleged to be denuded of his estate, was produced to the court of session, and is here printed from an admitted copy delivered in to the Committee.

#### ASSIGNATION,

Margaret Bonnar and William Melvill, to  
Captain John Graham.

“ **I** Margaret Bonnar, spouse to William  
 “ Melvill of Easter Pittscottie, heri-  
 “ table proprietor of the lands after men-  
 “ tioned, and pertinents, with consent of  
 “ my said husband ; and I the said William  
 “ Melvill, for myself, my own right and  
 “ interest, with consent of, and taking bur-  
 “ den, upon me for, my said spouse ; and we  
 “ both, of one consent and assent, consi-  
 “ dering that Captain John Graham, eldest  
 “ lawful son procreated of the marriage  
 “ between me the said Margaret Bonnar  
 “ and Thomas Graham, surgeon in Cupar  
 “ of Fife, my former husband, has not only  
 “ 2 “ advanced

“ advanced and paid to and for us, the  
“ sum of 400l. sterling money, but also  
“ granted security for payment to us, and  
“ the longest liver of us, during all the days  
“ of the longest liver’s life, of an annuity  
“ of 20l. sterling money yearly, at the  
“ terms therein mentioned, for and on  
“ account of our granting these presents,  
“ in manner under written : Therefore we,  
“ of one consent and assent, and taking  
“ burden as aforesaid, hereby *assign and*  
“ *dispose*, to and in favour of the said Cap-  
“ tain John Graham, and his heirs and as-  
“ signees whomsoever, all and sundry *the*  
“ *rents, mails, duties, and emoluments, kains,*  
“ *customs, and casualties, yearly due, and*  
“ *payable for, and forth of, all and whole*  
“ *the town and lands of Greigston, with*  
“ *the parsonage-teinds thereof included,*  
“ *parts, pendicles, tofts, crofts, houses,*  
“ *mairs, marshes, coals, coal-heughs, and*  
“ *other pertinents thereof whatsoever, ly-*  
“ *ing within the parish of Cameron, and*  
“ *sheriffdom of Fife, belonging in property*  
“ *to*

“ *to me the said Margaret Bonnar, and that*  
 “ *for all the days and years of my life,*  
 “ *from and since the term of Whitsunday*  
 “ *last, in the year 1765 ; surrogating and*  
 “ *substituting the said Captain John Gra-*  
 “ *ham, and his above-written, in our*  
 “ *right, title, and place of the premisses ;*  
 “ *with full power to them to output and*  
 “ *input tenants in the aforesaid lands, with*  
 “ *the pertinents ; and for that effect to is-*  
 “ *sue, and cause execute, precepts of*  
 “ *warning against the said tenants and*  
 “ *possessors, either in their own or our*  
 “ *names, as they shall think expedient ;*  
 “ *and thereupon to obtain decreets of re-*  
 “ *moving and ejection, and to put the same*  
 “ *to due and lawful execution ; and to*  
 “ *intromit with, uplift, charge for, and*  
 “ *discharge, the rents, mails, duties, and*  
 “ *other casualties and emoluments of the said*  
 “ *estate hereby assigned and disposed ; and,*  
 “ *in general, all and sundry other things,*  
 “ *in relation to the premisses, to do, in*  
 “ *the same manner, and as freely and ab-*  
 “ *solutely*



“ solutely in all respects, that we, or ei-  
 “ ther of us, could have done before grant-  
 “ ing of this present right and assignation;  
 “ which we bind and oblige us, and our  
 “ heirs and executors, to warrant to be  
 “ good, valid, and sufficient, to the said  
 “ Captain John Graham, and his forefaids,  
 “ from our respective facts and deeds done  
 “ or to be done in prejudice hereof, and no  
 “ further: And to the intent the said Cap-  
 “ tain John Graham, and his above writ-  
 “ ten, may be the *more effectually enabled*  
 “ *to levy and recover payment of the rents,*  
 “ *duties, and others, hereby assigned and dis-*  
 “ *posed,* and to prosecute and follow forth  
 “ any action of removing, when necessary,  
 “ that may be commenced and insisted in  
 “ against the tenants and possessors, either  
 “ in their own or our names, we have  
 “ herewith delivered up to the said Cap-  
 “ tain John Graham the charter under the  
 “ great seal, of the aforesaid lands of  
 “ Greigston, *expede in favour of me the said*  
 “ *Margaret Bonnar, with the instrument of*  
 Vol. IV. S “ *seisin*



*“seisin following thereon, &c. Dated 8th  
“ March, 1766.”*

The counsel for the petitioner insisted,  
That, on the face of this deed, it appeared, that Mr. Graham was thereby put in possession of the estate, and, therefore, as possession, either in his own right, or that of his wife, was necessary to entitle Mr. Melvill to remain on the roll, and to vote, both by the statute of 1681, and more particularly by 7 Geo. II. c. 16, he had no longer any legal right to be considered as a freeholder. That, although he had taken the oath prescribed by the statute (1), they were still at liberty to call his possession in question; as you are at liberty to prove a man to have been bribed who has taken the bribery oath prescribed by 2 Geo. II. cap. 24. That Graham could never be considered merely as a lessee, because his mother had executed a judicial

(1) 7 Geo. II. cap. 16. § 2.

ratification

ratification of the conveyance to him, which is never done in the case of a lease, such an act being in the nature of a fine levied by a feme covert in England.

On the other side it was contended,

That Graham was a mere lessee; That though he might have the natural possession of the estate, still the legal, or civil possession continued in the father and mother; That the feudal connection between them and the Crown remained unaltered; and that the land would be forfeited by an act of treason committed by the wife, but could not be forfeited by the treason of the son.

The counsel having finished their arguments, the Committee took some time to deliberate; after which the counsel were called in, and the Chairman informed them that the Committee were of opinion,

That Hugh Dalrymple, Esq; of Fordell,  
and William Melvill, Esq; of Griegston,

had a right to vote at the last election of a member to serve in Parliament for the county of Fife.

Upon this, the counsel for the petitioner said they would not give the Committee any farther trouble.

On Friday, the 22d of March, the Committee, by their Chairman, informed the House, that they had determined,

That the fitting member was duly elected (1).

(1) Votes, p. 510.

NOTES

## N O T E S

ON THE CASE OF

F I F E.

PAGE 194. (A.) A reclaiming petition is somewhat similar to a petition for a rehearing.

P. 198. (B.) There was a third objection taken by the counsel for the complainants, in the court of session. By Mr. Dalrymple's charter, the term when the power of redemption was to commence, was Whitsunday, 1777. By the disposition, Whitsunday 1770. This point, like that concerning the validity of the seizin, was not raised at the election-meeting. It was contended, before the court of session, That Mr. Dalrymple, by acquiescing under the judgment of the freeholders in 1767, had admitted that the charter and infestment alone were not sufficient to entitle him to be put on the roll; and that the production of the disposition, as the warrant for the charter, was requisite; and that now, when that

disposition was produced, it appeared, that the charter was granted without a warrant; because a charter conveying land, redeemable in 1777, and not till then, could not be authorised by a disposition of land redeemable in 1770; that the complainant had a right to suppose, that the disposition, which was the warrant for the charter, had been suppressed, and another substituted in its place, to serve some purpose best known to the parties.

In answer, it was said,

That the production of the disposition was unnecessary, because the nature of the right appeared sufficiently from the charter. That, in questions of enrolment, all the evidence required is the investiture by which the claimant is received as the King's vassal; and that this consists only of the charter under the great seal, and the seisin consequent upon it. That, however, it was evident, from a comparison of the disposition and the charter, that the one was the warrant of the other; for that the procuratory of resignation, contained in the disposition, was regularly executed, accepted of, and a new signature made out, which was subscribed by the Barons of the Exchequer, and the King's cachet adhibited. That, in the signature, the term of redemption is agreeable to that in the procuratory of resignation, *viz.* 1770. That the date and dispositive clause in the disposition are recited in the signature, and also in the charter, and that

that the only variance is the addition (by a mistake of the clerk) of the word "*septimo*" in the charter, which is not found in the disposition, the signature, or the record in the King's Remembrancer's office. Finally, that, at any rate, this objection being of what is called *jus tertii*, as between Mr. Dalrymple and the freeholders of Fife, *they* had no right to take cognizance of it, nor the court of session, in a cause brought from the court of freeholders before them. That the variance as to the term for the commencement of the reversion was a matter that only concerned the reverser and wadsetter; and that, whether the lands were to become redeemable in 1770, or 1777, the qualification of Mr. Dalrymple, as a voter, would be equally good.

The court of session seems to have given no opinion on this matter. It was, I presume, abandoned by the counsel for the complainants, before the cause came to be decided, otherwise it must have made a third separate question.—The reclaiming petition takes no notice of it, and it was only mentioned historically, but not argued, before the Committee.

P. 218. (C.) In confirmation of what is here alleged, see the case of the Earl of Shrewsbury against the Earl of Rutland, on a writ of error to the Court of King's Bench, Hill. 7 Jac. 1. (1. Bullstrode. 4, to 11). In that case three errors were assigned, yet, though in delivering their opinions there were three



out of five \* judges who agreed with the Court of Common Pleas on each separate point, the judgment was reversed.—From the report of the case, the propriety of separating a cause, where there are different points, into distinct questions, appears to have been fully argued ; and the court held that it ought not to be done.

To ascertain which of the methods is the right one, or in what cases the one should be followed, and in what cases the other, seems to me a problem of very great nicety, and very difficult to solve.

P. 239. (D.) The case of Ogilvie, against Skene and Hunter, does not seem applicable on the present occasion ; for the chief question in that case was not, whether a mistake in drawing the instrument of seizin (livery being supposed to have been properly given) should vitiate the seizin, but, whether a dispensation, in a charter, from the necessity of giving separate local seizin of discontiguous lands, was, or was not, valid, under the particular circumstances of the case, so as to render a general seizin, which had been given, sufficient. (*Vide* Collection of Cases in the House of Lords.)

P. 249. (E.) In the report of this case of Macleod against Ross, it is not mentioned, whether the complainant was, or was not, present at the freeholders' court. If he was present, this is an authority against

\* The court at that time consisted of five judges. Blackst. Com. vol. iii. p. 40.

what was argued by the counsel for the sitting member (*supra*, p. 223), viz. that new objections are not competent in the court of session, or before a Committee, to persons who were *present* in the court of freeholders.



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## ADVERTISEMENT.

**I**N the two first volumes of this collection, I thought it necessary, in order to complete the history of the Cases of Hindon and Shaftesbury, to give an account of the proceedings in the House of Commons during the first session of the present Parliament, in consequence of the special reports of the Committees by whom those two causes were tried (1). It is equally necessary, for the same reason, to lay before my Readers an account of the continuation of those proceedings in the subsequent sessions; as well as of the prosecutions, which the House or-

(1) *Supra*, vol. i. p. 180, to 200. vol. ii. p. 311, to 314.

## ADVERTISEMENT.

dered to be carried on by his Majesty's Attorney General, against the persons who were the objects of the special reports. This I have therefore done, in the following Supplements to the two above-mentioned Cases.

SUPPLE-

S U P P L E M E N T

TO THE

C A S E O F H I N D O N.

VOL. I. CASE IV.



THE AMERICAN

OF THE

AMERICAN

OF THE

## S U P P L E M E N T

T O T H E

C A S E O F H I N D O N.

V O L. I. C A S E I V.

**O**N the 8th of May, 1775, the House had resolved, that they would take the special report of the Committee who tried this cause into further consideration, as early as possible in the next session of Parliament, and that, in the mean time, no warrant should be ordered for a new writ (1)—On the same day the orders were made for the prosecution of the four candidates, as they have been stated in the history of the case (2).

(1) Votes, 8 May, 1775, p. 645, 646.

(2) *Supra*, vol. i. p. 199.

At

At the beginning of the subsequent session, on Thursday, the 2d of November, 1775 (the Parliament having met on the 26th of October), an order was made, for taking the special report into consideration on Monday, the 29th of January following (1); and, at the same time, it was also ordered, That Mr. Speaker should not issue his warrant for the making out a new writ, for electing burgeses to serve in Parliament, for the borough of Hindon, before the 29th of January (2).

Monday, the 29th of January, 1776,—The consideration of the report was put off till the Wednesday following (3).

Wednesday, the 31st of January,—The order of the day for that purpose being read, the House proceeded to take the report into consideration, and it was read. Then an order was made, That leave should be given to bring in a bill for the

(1) Votes, p. 43.

(2) *Ibid.*

(3) Votes, p. 212.

same

same purposes with the two which had been brought in, during the former session (1); and a Committee was nominated for preparing and bringing it in, consisting of the same gentlemen who constituted the Committee appointed to bring in the second bill, in the former session (2).

Monday, the 5th of February.—Mr. Dundas having presented the bill (3), the same proceedings were had as in the former session, when the second bill was presented (4), and the same persons severally ordered to attend, on the second reading.—The second reading was fixed for the 19th of February (5).

Monday, the 19th of February.—Before the order of the day for the second reading of the bill was called for, three petitions, of different sets of electors, were presented and read (6), containing allegations nearly to the same effect with those in the three first petitions presented on

(1) *Supra*, vol. i. p. 181, 182. 187, 188.

(2) *Ibid.* p. 187.

(3) *Votes*, p. 24c.

(4) *Supra*, vol. i. p. 186.

(5) *Ibid.*

(6) *Ibid.* p. 345, to 347.

the 26th of April in the preceding year (1). These petitions were ordered to lie on the table until the bill should be read a second time; and leave was given to the petitioners in the first, (who complained of the bill as an extraordinary and injurious criminal prosecution,) to be heard against it by their counsel, on the second reading (2).

The order of the day and the bill itself being now read, the counsel for the petitioners just mentioned (Mr. Batt), was heard against it (3); after which it was committed to a Committee of the whole House, and the Friday following appointed for the House to resolve itself into that Committee (4).—The other two petitions were ordered to be referred to the Committee of the whole House, and leave given to the petitioners to be heard, by themselves or their counsel, against the

(1) *Supra*, vol. i. p. p. 188, to 192.

(2) *Votes*, p. 346. (3) *Ibid.* p. 347.

(4) *Ibid.*

bill (1).—The several persons ordered, on the 5th of February, to attend this day, were again ordered to attend on the Friday (2); and this *joint* order with regard to them, was repeated during the rest of the session, whenever the proceedings in this business were adjourned to a future day.

Friday, the 23d of February.—A petition of several voters for the borough of Hindon, was presented, and read; setting forth, That the petitioners had attained the age of twenty-one years since the last election, and since a petition had been presented on behalf of near fifty of the inhabitants of the said borough not included in the bill brought into the House to incapacitate certain persons from voting for members for the said borough; and, praying that nothing might pass into a law that could, in any degree, affect the interest of the petitioners, as free voters for the said borough (3).

(1) Votes, p. 347, 348. (2) *Ibid.* p. 348.

(3) *Ibid.* p. 374.



This petition was referred to the Committee of the whole House (1).

On the same day, the order for that purpose being read, the House resolved itself into a Committee on the bill; and, Mr. Elwes being appointed Chairman, they made some progress; after which the Speaker resumed the chair, and it was resolved, That the further consideration of the bill should be proceeded on, in a Committee of the whole House, on the Thursday following (2).

On Thursday, however, (the 29th of February) the order of the day being read, The Committee of the whole House was postponed till that day sevensnight (3).

Thursday, the 7th of March.—The House resolved itself into a Committee on the bill; and, after some time spent therein, the Speaker resumed the chair; and the House adjourned, without appointing any

(1) Votes, p. 374.

(2) *Ibid.*

(3) P. 396.

future day for proceeding further in this business (1).

On the day following, (*viz.* Friday, the 8th of March,) Tuesday, the 19th of March, was fixed, for the House to resolve itself again into a Committee on the bill (2).

Tuesday, the 19th of March.—The order of the day was read, and the House resolved itself into a Committee, and made some further progress in the bill; after which, the Speaker resuming the chair, the Friday following was fixed for the House to resolve itself again into a Committee on the bill (3).

Friday, the 22d of March.—A similar proceeding was had, and the matter further postponed to the Wednesday following (4).

Wednesday, the 27th of March.—The like proceedings took place as on the 7th (5).

(1) Votes, p. 433. (2) *Ibid.* p. 439.

(3) *Ibid.* p. 484. (4) *Ibid.* 513.

(5) *Ibid.* p. 534.

On Monday, the 1st of April, the next day was appointed for the House to resolve itself again into a Committee, on the bill (1).

Tuesday, the 2d of April.—The like proceedings took place as on Tuesday, the 19th of March ; and the 24th of April was appointed for proceeding further on the consideration of the bill (2).

On that day, the House adjourned till Thursday, the 18th (3), on account of the Easter holidays.

Wednesday, the 24th of April.—The Committee of the whole House was postponed till that day sevensnight (4).

And, on that day sevensnight, (Wednesday, the 1st of May) it was further postponed till the Tuesday following (5).

Tuesday, the 7th of May.—The order of the day relative to this matter being

(1) Votes, p. 552.

(2) *Ibid.* p. 566.

(3) *Ibid.*

(4) *Ibid.* p. 585.

(5) *Ibid.* p. 640.

read, the House adjourned without resolving itself into a Committee, or appointing any future day for that purpose (1).

On Wednesday, the 8th of May, The House came to the following resolution :

Resolved, “ That this House will, upon  
 “ this day *three months*, resolve itself into a  
 “ Committee of the whole House, to con-  
 “ sider further of the bill to incapacitate  
 “ certain persons, therein mentioned, from  
 “ voting at elections of members to serve  
 “ in Parliament, for the borough of Hin-  
 “ don, in the county of Wilts (2).”

The reader perceives that, by this resolution, the bill was *virtually* thrown out. It was known that the session would be at an end, long before the day thereby appointed for taking it again into consideration; and all bills depending at the end of a session fall, of course, to the ground. If the House had intended to take up the affair in the succeeding session, they

(1) Votes, p. 683.

(2) *Ibid.* p.

have come to a like resolution with that of the 8th of May, 1775 (1). But, in truth, there was no such design. I have mentioned, on a former occasion (2), the objections to the plan of changing entirely the right of election in Hindon. It is evident, that some of those objections were applicable to the scheme of introducing a new set of voters in conjunction with the former; though this scheme had been adopted by the Parliament, with regard to the borough of New Shoreham (3). It was foreseen, likewise, that there would have been great difficulty in fixing on the new class of voters, because the influence of different gentlemen of property in the neighbourhood of the place, would have been more or less increased, or diminished, according as the freeholders of one, two, or more hundreds, should have been ad-

(1) *Supra*, vol. i. p. 197.

(2) *Supra*, vol. i. p. 201, to 203. Note (B).

(3) 11 Geo. III. cap. 55.

mitted to a participation of the right of election. There was some danger, therefore, that a law which, in its origin, was intended to be a public benefit, and to amend the constitution, might, in the end, turn out a mere job, and become subservient to the particular interest of certain individuals. In short, many, who had, at first, promoted and supported the bill, began, in the course of the session, to alter their opinion with regard to it; or lost, at least, much of the zeal, which they had formerly shown, for its success. On the different occasions, when it was to be taken into consideration, there was often other business more urgent, and more generally interesting, to be discussed; and, by the time *that* was finished, and the order of the day, for the House to resolve itself into a Committee on the Hindon bill, called for, the greater number of members, already worn out by a long attendance, were glad to leave the House. Advantage was taken of this, by some gentlemen, who,



who, from the beginning, made no scruple of avowing their resolution of employing every means, and every stratagem, which the forms of procedure in the House of Commons should furnish, or authorize, in order to defeat the bill. Forty members are necessary to constitute a House; and, if it appear that there is not that number present, an immediate adjournment must take place. Whenever those gentlemen imagined that the number present was under forty, they moved, that the House should be counted, and, in this manner, the proceedings were, at several times, suddenly stopped; *viz.* on Thursday, the 7th of March (1); on Wednesday, the 27th of that month (2); and on Tuesday, the 7th of May (3).—Another art was practised, with equal, or even greater, success. Every possible objection to the admissibility of evidence, was either raised by some

(1) *Supra*, p. 277.(2) *Ibid.*(3) *Ibid.* p. 279.

member of the House, or taken by the counsel who attended at the bar on the part of the persons who had petitioned against the bill. Almost every such objection produced an argument, a debate, a question, and a division. Thus, the progress of the business was clogged and retarded so very effectually, as to make even those who continued the most anxious promoters of it, despair of ever bringing it to a conclusion; insomuch that, at length, by a sort of tacit agreement of all parties, the whole was dropt, and the resolution of the 8th of May, 1776, which has been stated, having been come to, it was immediately followed by another, in these words :

Resolved, “ That Mr. Speaker do issue  
 “ his warrant to the clerk of the Crown,  
 “ to make out a new writ, for the electing  
 “ of two burgesſes, to ſerve in this preſent  
 “ Parliament, for the borough of Hindon,  
 “ in the county of Wilts, the laſt election  
 “ for

“ for burgesſes to ſerve in this preſent Par-  
 “ liament, for the ſaid borough, being  
 “ declared void (1).”

On Friday, the 3d of May, the follow-  
 ing order had been made :

Ordered, “ That Mr. Attorney General  
 “ do give this Houſe an account of what  
 “ proceedings have been [had] in the pro-  
 “ ſecutions of Richard Smith, Eſquire,  
 “ Thomas Brand Hollis, Eſquire, James  
 “ Calthorpe, Eſquire, and Richard Beck-  
 “ ford, Eſquire, purſuant to the direc-  
 “ tion of this Houſe, in the laſt ſeſſion  
 “ of Parliament (2).”

Agreably to this order, on Wednesday,  
 the 22d of May, Mr. Attorney General  
 made a report of the proceedings at law,  
 up to that time (3); which was ordered  
 to lie on the table (4); and a number of  
 copies thereof, ſufficient for the uſe of the

(1) Votes, 8 May 1776. p. 693.

(2) Votes, p. 656. (3) *Ibid.* p. 756.

(4) *Ibid.*

members of the House, was ordered to be printed (1).

This was accordingly done.

It has been shown, in a former part of this work, that bribery, at elections of members of Parliament, is held to be a crime at common law, independent of any statute against it, and to be punishable either by indictment, or information (2). The Attorney General adopted the latter mode of prosecution; and separate informations *ex officio* (3) were filed by him in Trinity term, 15 Geo. III. (which was the first term after the order of the House of Commons was made) against the four candidates, Smith, Hollis, Calthorpe, and Beckford.—This was in June, 1775.

In Hillary term, 16 Geo. III. the defendants pleaded not guilty; and, issue being joined, all the four informations were tried

(1) Votes, p. 757.      (2) *Supra*, vol. ii. p. 400.

(3) *Vide* Blackst. Comm. vol. iv. p. 304. 4to Ed.

at the Lent assizes, in the county of Wilts, in March 1776 (1), before Mr. Baron Hotham.

Mr. Calthorpe and Mr. Beckford were acquitted; Mr. Smith and Mr. Hollis were found guilty (2); and, on Monday, the 20th of May, being the last day of Easter term, 16 Geo. III. they were brought up to the court of King's Bench, to receive the judgment of the court; but, as the Judges were desirous to have longer time to consider of the proper punishment, they were committed till the next term, to the King's Bench prison.

Previous, however, to this commitment, *viz.* on the 16th of May, the new election for Hindon took place; and Mr. Smith having again declared himself a candidate, he was returned, together with Henry Dawkins, Esquire.

(1) *Vide* the Report of the Attorney General, presented to the House of Commons, p. 46. 55.

(2) They called no witnesses on their trials.

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Such was the state of the proceedings on the prosecutions of the Attorney General, when he made his report to the House, which therefore consisted of nothing, but copies of the records of the four informations, and of the pleas, and an account, in a few lines, of the event of the trials (A).

On Saturday the 7th of June, being the second day of Trinity term, 16 Geo. III. Mr. Smith and Mr. Hollis were again brought up for judgment.

On the former occasion, Mr. Serjeant Davy, as counsel for Mr. Smith, had informed the court, that his client had, a few days before, been re-elected, by a great majority of voices, to represent the borough of Hindon, and since there was not (as he alleged) the least shadow or pretence, for any charge of bribery against him at that election, he hoped *that* would operate with the court in mitigation of the punishment they might think fit to inflict upon him. He said that, at his *first* election, instead of introducing, for the first time, corruption  
into



into the borough, Mr. Smith himself had been led astray, and induced to the offence of which the verdict of a jury had found him guilty, by the established, and almost universal, practice, among the voters of Hindon, of exposing their suffrages to sale; and that, by the purity with which the *last* election had, on his part, been conducted, he was, in some measure, entitled to the praise of having reclaimed his electors from this inveterate abuse of their franchises.

Each of the informations contained several counts, and both Smith and Hollis were found guilty on *all* the counts, in the informations against *them*. Most of the counts charged them with acts of bribery committed in October 1774, immediately before the election. For those acts, they were liable still (until October 1776), to actions on the statute of 2 Geo. II. cap. 24. and to all the penalties inflicted by that statute (1). The court of

(1) *Vide supra*, vol. i. p. 410.

King's Bench, in the case of the King against Heydon, or Haydon, when the defendant was found guilty on an information for bribery granted by the court, respited the judgment, till the time within which actions on the statute might be brought, was expired (1), in order that he might not be twice punished for the same offence; and, nearly about the same time, in the case of the King against Pitt, and against Mead, they, on the same principle, established it as a general rule, not to grant informations for bribery, in future, until the end of the two years allowed by the statute, for proceeding by way of action (2). This rule, however, could only operate upon informations granted, by the discretion of the court, to private prosecutors, and could not affect those filed, *ex officio*, by the Attorney General (3). The reason

(1) 3 Burr. 1359.

(2) *Ibid.* p. 1340.(3) For the difference between these two sorts of informations, *vide* Blackst. Comm. vol. iv. p. 304. 4to Ed.

of the rule is, indeed, equally applicable to both, and, in cases of informations, *ex officio*, the court might obtain the same end, by respiting judgment, as in the case of the King against Heydon, till the expiration of the two years. But the rule, though *general*, was never meant to be *universal*; for, in the case of the King against Pitt, and against Mead, Lord Mansfield said, “There may  
 “possibly be particular cases, founded  
 “on particular reasons, where it may be  
 “right to grant informations, *before* the  
 “limited time for commencing the prosecution [on the statute of 2 Geo. II.  
 “cap. 24.] is expired (1).”

Mr. Justice Aston now delivered the judgment of the court. After stating the qualification with which the general rule had been accompanied in the above-mentioned case, he observed, That there was a very great difference between the cases in Burrow, (where the offence was the bri-

(1) 3 Burr. p. 1340.

bing of a single voter, and the prosecutions carried on by private persons, who might also have sued on the statute) and the present instance, which was that of a general corruption, and the prosecutor, the Attorney General, acting under the express order of the House of Commons. He entered largely into the nature, enormity, and dangerous tendency, of the offence; taking notice that, among many evil consequences, one of its most obvious effects was, to give rise to the crime of perjury, because a voter who has sold his vote, or has been even *promised* a reward for it, must, if the bribery-oath is tendered to him, be guilty of perjury, before he can be admitted to poll. He traced the history and gradual progress of election-bribery, and of the different remedies which the House of Commons and the legislature had provided against it; and mentioned, particularly, that a very gross scene of corruption, which had taken place at Beverley, in Yorkshire, in the

year 1727 (1), had given rise to the statute of 2 Geo. II. cap. 24.

The judgment he delivered nearly in the following words :

“ The court has taken into consideration the imprisonment you have already undergone, and they adjudge that you shall pay, each, a fine of 1000 marks ; and that you be imprisoned six months, and until you pay your respective fines.

“ As to you, Richard Smith, the court cannot help expressing their astonishment at what appeared from the mouth of your own counsel, that you continued so boldly to persist in your attempt, and that you have been again returned for the same place. They, therefore, have thought proper to add to *your* punish-

(1) It is impossible to collect any thing of the particular merits of this case of Beverley from the entries relative to it in the Journals. *Vide Journ.* vol. xxi. p. 24. col. 1. 1 Feb. 1727-8. p. 188. col. 1, 2. 22 Jan. 1728-9. p. 236. col. 1, 2. 25 Feb. 1728-9. p. 249. col. 2. 9. p. 250. col. 1. 4 March, 1728-9. p. 259. col. 1, 2. 8 March, 1728-9.

“ ment, that, at the expiration of the  
 “ term of your imprisonment, you shall  
 “ give security for your good behaviour  
 “ for three years—yourself and two sure-  
 “ ties—you to be bound in 1000*l.* and  
 “ each of the sureties in 500*l.*”

In consequence of this judgment, both the defendants were conveyed back to the King's Bench prison, where they continued till the 23d of November following, *i. e.* for the space of 168 days, or 6 *lunar* months (1).

On that day, their fines having been paid into the hands of Sir James Burrow, the clerk of the Crown, some days before, Mr. Hollis was discharged by the marshal.

(1) “ A month in law is a *lunar* month, or twenty-  
 “ eight days, unless otherwise expressed, not only  
 “ because it is always one uniform period, but be-  
 “ cause it falls naturally into a quarterly division by  
 “ weeks.” Blackst. Comm. vol. ii. p. 141. 4to ed.  
 ---There is another reason why, in cases of punish-  
 ment by imprisonment, the computation should be by  
 lunar months; namely, the favour which is always to  
 be shewn to liberty, where the terms are ambiguous  
 and doubtful.



Mr. Smith was brought up to Westminster-hall, and, in the treasury-chamber of the court of King's Bench, was bound over, agreeably to his sentence, for three years. This passed before Mr. Justice Aston, and Mr. Justice Willes, before the other Judges were come down. Yet, I presume, it is to be considered as having been done in court, since the recognizance was undersigned "*By the Court.*" (1)

The reader will remark that the same incapacities ensue upon a conviction on a prosecution for bribery by way of information at common law, as when the proceeding is by an action under the statute; the disabling words in the act of 2 Geo. II. cap. 24, being as follows:

" And every person offending in any of  
 " the cases aforesaid, from and after  
 " judgment obtained against him in any  
 " such action of debt, bill, plaint, or in-  
 " formation, or summary action, or prose-

(1) I was favoured by Sir J. Burrow with the account of these circumstances.

“ cution, or being any otherwise lawfully  
 “ convicted thereof, shall for ever be dis-  
 “ abled to vote in any election of any  
 “ member or members to Parliament,  
 “ and also shall for ever be disabled to  
 “ hold, exercise, or enjoy any office or  
 “ franchise to which he and they then  
 “ shall, or at any time afterwards may be  
 “ entitled, as a member of any city, bo-  
 “ rough, town-corporate, or cinque port,  
 “ as if such person was naturally dead (1).”

There was no petition presented in the last session of Parliament, complaining of the re-election of Mr. Smith on the 16th of May; but, as there was not a fortnight between the time when the return was brought in, and the end of the session, which happened on the 23d of May, an opportunity still remained for petitioning at the beginning of the present session, according to the rule mentioned in the Preface to Vol. III (2).”

Accordingly, a petition of Mr. Beckford who had been again a candidate, complain-

(1) § 7. (2) *Vide supra*, vol. iii. pref. p. v.

ing of the election of Mr. Smith, was presented on the 1st day of November, 1776 (1); and, afterwards, another petition of certain electors in the interest of Mr. Beckford was also presented, on Monday, the 11th of the same month (2).

Both these petitions are to be taken into consideration on Thursday, the 23d of January, 1777 (3).

(1) Votes, p. 14, 15. (2) *Ibid.* p. 48, 49.

(3) *Ibid.* 8 Nov. p. 39. 11 Nov. p. 49.

N O T E S  
ON THE  
S U P P L E M E N T  
TO THE  
C A S E of H I N D O N.

PAGE 287. (A.) The Record of the Information against Mr. Smith, and of the subsequent proceedings, as far as they were laid before the House of Commons, is as follows:

Of TRINITY TERM, in the Sixteenth Year of the Reign of King GEORGE the Third.

WILTSHIRE.

“ B E it remembered, That Edward Thurlow, Esquire, Attorney General of our present Sovereign Lord the King, who for our said Lord the King in this behalf prosecuteth, in his proper person cometh here into the court of our said Lord the King, before the King himself, at Westminster, on Friday  
next

next after the morrow of the Holy Trinity, in this same term, and for our said Lord the King, gives the court here to understand and be informed, That the borough of Hindon in the county of Wilts is an ancient borough, and for a long space of time two burgeses of the said borough have been elected and sent, and have used and been accustomed and of right ought to be elected and sent, to serve as burgeses for the said borough in the Parliament of this kingdom, (to wit) at the borough of Hindon aforesaid, in the said county of Wilts: and the said Attorney General of our said Lord the King, for our said Lord the King, giveth the court here to understand and be informed, That *on the first day of October*, in the fourteenth year of the reign of our present Sovereign Lord George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c. a certain writ of our said Lord the King, under the great seal of Great Britain, issued out of his Majesty's court of Chancery (the said court then and still being at Westminster in the county of Middlesex) directed to the Sheriff of the county of Wilts; by which said writ, our said Lord the King reciting, That whereas by the advice and assent of his Majesty's council, for certain arduous and urgent affairs concerning his said Majesty, the state and defence of his kingdom of Great Britain and the church, his Majesty ordered a certain Parliament to be holden at the city of Westminster, on the 29th day of November

vember then next ensuing, and there to treat and have conference with the prelates, great men, and peers of his realm; his Majesty by his said writ did command and strictly enjoin the said Sheriff, That proclamation being made of the day and place aforesaid in the said Sheriff's then next county court to be holden after the receipt of that his said Majesty's writ, two knights of the most fit and discreet of the said county, girt with swords, and of every city of his said county two citizens, and of every borough in the same county two burgessees, of the most sufficient and discreet, freely and indifferently by those who at such proclamation should be present, according to the form of the statute in that case made and provided, the said then Sheriff should cause to be elected, and the names of those knights, citizens, and burgessees, so to be elected, whether they should be present or absent, the said then Sheriff should cause to be inserted in certain indentures to be thereupon made, between the said then Sheriff and those who should be present at such election, and them at the day and place aforesaid the said then Sheriff should cause to come in such manner that the said knights for themselves and the commonalty of the same county, and the said citizens and burgessees for themselves and the commonalty of the said cities and boroughs respectively, might have from them full and sufficient power to do and consent to those things which then and there by the common council of his said Majesty's kingdom, by the blessing of God should happen to be ordained



ordained upon the aforesaid affairs, so that for want of such power or through an improvident election of the said knights, citizens, or burgesſes, the aforesaid affairs might in no wiſe remain unfinished; willing nevertheless, that neither the said then Sheriff nor any other Sheriff of this his Majesty's said kingdom should be in any wiſe elected; and the election in the said then Sheriff's full county ſo made diſtinctly and openly under the said then Sheriff's ſeal, and the ſeals of thoſe who ſhould be preſent at ſuch election, the ſaid then Sheriff ſhould certify to his Majesty in his Chancery, at the day and place without delay, remitting to his Majesty one part of the aforesaid indentures annexed to the ſaid writ, together with the ſaid writ; and the ſaid Attorney General of our ſaid Lord the King, for our ſaid Lord the King, gives the court here further to underſtand and be informed, that the ſaid writ afterwards, and before the return thereof (to wit) on the ſaid firſt day of October in the 14th year aforesaid, was delivered to Thomas Eaſtcourt, Eſquire, then and continually from thenceforth until and at and after the return of the ſaid writ being Sheriff of the ſaid county of Wilts, to be executed in due form of law (to wit) at the borough of Hindon aforesaid: And the ſaid Attorney General of our ſaid Lord the King, for our ſaid Lord the King, gives the court here further to underſtand and be informed, that by virtue of the ſaid writ, the ſaid Thomas Eaſtcourt, ſo being Sheriff as aforesaid, afterwards, and before the return of the ſaid writ (that is to ſay) on  
the

the said first day of October, in the fourteenth year aforesaid, and in the year of our Lord One thousand seven hundred and seventy-four, at the borough of Hindon aforesaid, in the said county of Wilts, made his precept in writing, sealed with the seal of his office of sheriff of the said county of Wilts, directed to the then bailiff of the borough of Hindon in the said county of Wilts, of and for the election within the said borough, of two burgesses of the borough aforesaid, according to the form and effect of the said writ : And the said Attorney General of our said Lord the King, for our said Lord the King, gives the court here further to understand and be informed, that by virtue of the said precept afterwards, and before the return thereof (to wit) on the 10th day of October, in the 14th year aforesaid, at the borough of Hindon aforesaid, in the said county of Wilts, the election of two burgesses to serve as burgesses for the said borough, in the then next Parliament to be holden as aforesaid, was had and made ; which said election was the first and next election of burgesses to serve as burgesses for the said borough, in the Parliament of this kingdom, after the committing of the several offences herein-after firstly, secondly, thirdly, and fourthly mentioned : And the said Attorney General of our said Lord the King, for our said Lord the King, gives the court here further to understand and be informed, that before the issuing of the said writ, a general election of representatives to serve in Parliament for the several  
counties,

counties, cities, and boroughs in this kingdom, being expected, James Calthorpe, Esquire, Richard Beckford, Esquire, Richard Smith, Esquire, and Thomas Brand Hollis, Esquire, were candidates, that of them two might be chosen and returned to serve as burgesſes for the ſaid borough, in the then next Parliament for this kingdom; and the ſaid James Calthorpe, Richard Beckford, Richard Smith, and Thomas Brand Hollis, remained and continued candidates for the purpose aforeſaid, until and at the time of the ſaid election, to wit, at the borough of Hindon aforeſaid, in the ſaid county of Wilts: and the ſaid Attorney General of our ſaid Lord the King, for our ſaid Lord the King, gives the court here further to underſtand and be informed, that the ſaid Richard Smith, late of the ſaid borough of Hindon, in the ſaid county of Wilts, Esquire, well knowing the premisses, but being a person of a depraved, corrupt, and wicked mind and disposition, and unlawfully and wickedly intending, as much as in him the ſaid Richard Smith lay, to interrupt and prevent the free and indifferent election of burgesſes to ſerve for the ſame borough of Hindon, in the then next Parliament of this kingdom, and by illegal and corrupt means to procure himſelf to be elected a burgesſ to ſerve for the ſaid borough in the then next Parliament of this kingdom, before the ſaid election, to wit, on the 15th day of February, in the 13th year of the reign of our Sovereign Lord George the Third,

now

now King of Great Britain, &c. at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly did solicit, urge, and endeavour to procure Thomas Moore, Charles Simpson, John Baldwyn, Jeremiah Lucas, Robert Tyley, Thomas Farrell, Jos. Norton, Jos. Cuff, John Edwards, William Stephens, John Maishment, John Larkham, Renalder Bowles, Jos. Cholfey the younger, John Davis the elder, Richard Erwood, William Cheverall, Samuel Dorr, Thomas Harden, James Edwards, Jos. Cholfey the elder, Thomas Spencer, James Smart, John Randall, Edward Ranger, John Dewy, Luke Beckett, Philip Beckett, Henry Dukes, Edward Beckett, Isaac Moody, William Hacker, John Bishop, Edward Hollowday, George Spender the younger, John Cheverall, John Dukes the elder, John Dukes the younger, Robert Wyer, Moses Weeks, George Dukes, George Hayward, Edward Trewlock, Matthew Davis, Philip Beckett the younger, Henry Jerrett, John Davis the younger, William Day, Samuel Collier, Walter Percy, Edward Shergold, Benjamin Beckett, Edward White, John Hooper the elder, Samuel Farthing, John Hooper the younger, William Newton the elder, William Newton the younger, James Percy, Henry Huffle the elder, Henry Huffle the younger, Benjamin Cholfey the younger, John Bell, George Spender the elder, James Anderson the younger, William Lambe, Jos. Lambe, Edward White, Robert Wyer, Mathew White the younger, Mathew Stevens, William White, Richard Ingram, Francis Ranger, William Percy,

Percy, Elias Pitman, William Cuff the elder, Matthew White the elder, William Stevens, George Stevens, John Stevens the elder, James Stevens, John Stevens the younger, John Wyer, Benjamin Cholfey the elder, William Ranger, Francis Cheverall, Charles Wyer, James Wyer, John White, William Wyer, James Anderson the elder, John Beckett, Thomas Wyer, Luke Beckett the elder, Roger Spender, Robert Day, William Cuff the younger, Elias Steevens, James Steevens, William Gilham, Henry Savage, Jarvis Gilbert, Thomas Percy, John Ranger, Edward Percy, William Percy the younger, Robert Gilbert, William Dukes, Thomas Dukes, Roger Norton, Joseph Moody, James Gilbert, John Gane, Luke Mead, Nathaniel Philips, Joseph Norton, Samuel Norton, John Ransome, Thomas Brooks, Samuel Philips, Joseph Scamell, William Sandall the elder, Luke Maishment the younger, Luke Maishment the elder, John Maishment, William Sandall the younger, James Burleigh, William Harden, Samuel Field, John Bowles, Robert Ranger, Thomas Lanham, John Richardson, William Spender, Henry Obourne, John Penny, Richard Pitman, William Nisbeck, James Davies, Joseph Gilbert, James Gough, James Wier, John Gilbert, and John Steevens, respectively, each and every of them, then and there, and until and at the time of the said election, having a right to vote at and in the election of burgesſes, to ſerve as burgesſes for the ſame borough in the Parliament of this kingdom,



dom, for him the said Richard Smith, and the more effectually to tempt, corrupt, and procure the said several persons who had a right to vote as aforesaid, to give their respective votes for him the said Richard Smith in the said election, he the said Richard Smith did then and there, to wit, on the said 15th day of February, in the 13th year aforesaid, at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly give, and cause and procure to be given, to the said several persons respectively, who had such right to vote as aforesaid, a certain sum of money, to wit, the sum of five guineas of lawful money of Great Britain, as a bribe and reward to engage, corrupt, and procure the said several persons respectively, so having such right to vote as aforesaid, to give their respective votes in the said election of burgesses to serve as burgesses for the said borough in the then next Parliament of this kingdom, for him the said Richard Smith, in order that he the said Richard Smith might be elected and returned, to serve as a burgess for the said borough, in the said then next Parliament of this kingdom, to the great obstruction and hindrance of a free, indifferent, and unbiassed election of burgesses to serve in Parliament for the same borough, in manifest violation and subversion of the constitution of this kingdom, and of the liberties and privileges of the subjects thereof, to the evil and pernicious example of all others in the like case offending, and against the peace of our



said Lord the King, his crown and dignity: And the said Attorney General of our said Lord the King, for our said Lord the King, giveth the court here further to understand and be informed, that the said Richard Smith, being such person as aforesaid, and unlawfully and wickedly intending (as much as in him the said Richard Smith lay) to interrupt and prevent a free and indifferent election of burgesſes to serve for the said borough of Hindon in the then next Parliament of this kingdom, and by illegal and corrupt means to procure himself to be elected to serve as burgesſ for the said borough in the then next Parliament of this kingdom, before the said election, (to wit) *on the third day of October*, in the 14th year aforesaid, at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly, in the presence and hearing of divers persons, who had then and there a right to vote in the election of burgesſes to serve for the said borough in the Parliament of this kingdom, did declare, and with a loud voice publish, that he would give to each and every person who had a right to vote in the said election of burgesſes to serve for the said borough of Hindon in the then next Parliament of this kingdom, bribes and rewards to vote in that election for him the said Richard Smith, with intent unlawfully to tempt, corrupt, and procure the persons having a right to vote in that election, to give their votes in that election for him the said Richard Smith, that he the said Richard  
Smith

Smith might be elected and returned a burges to serve for the said borough in the said then next Parliament of this kingdom, to the great obstruction of a free, quiet, and indifferent election of burgeses to serve in Parliament as burgeses for the same borough, in manifest violation and subversion of the constitution of this kingdom, and of the liberties and privileges of the subjects thereof, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lord the King, his crown and dignity: And the said Attorney General of our said Lord the King, for our said Lord the King, gives the court here further to understand and be informed, that the said Richard Smith, being such person as aforesaid, and again unlawfully, wickedly, and corruptly intending (as much as in him the said Richard Smith lay) to interrupt and prevent the free and indifferent election of burgeses to serve as burgeses for the said borough in the Parliament of this kingdom, and by illegal and corrupt means to procure himself to be elected a burges to serve as a burges for the said borough in the Parliament of this kingdom, he the said Richard Smith, afterwards, and before the said election so had and made as aforesaid, to wit, on the 4th day of April, in the 14th year of the reign of our Lord the now King, at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly did give, and cause and procure to be given, to divers other persons, namely,

Thomas Moore, Charles Simpson, John Baldwin, Jeremiah Lucas, Robert Tyler, Thomas Farrell, Joseph Norton, Joseph Cuff, John Edwards, William Stevens, John Maishment, John Larkham, Renalder Bowles, Joseph Cholfey the younger, John Davis the elder, Richard Erwood, William Chiverall, Samuel Daw, Thomas Harden, James Edwards, Joseph Cholfey the younger, Thomas Spencer, James Smart, John Randle, Edward Ranger, John Dewey, Luke Becket, Philip Becket, Henry Dukes, Edward Becket, Isaac Moody, William Hacker, John Bishop, Edward Hollowday, George Spencer the younger, John Cheverall, John Dukes the elder, John Dukes the younger, Robert Wyer, Moses Weeks, George Dukes, George Hayward, Edward Trewlock, Mathew Davis, Philip Becket the younger, Henry Jerret, John Davis the younger, William Day, Samuel Collier, Walter Percy, Edward Shergold, Benjamin Beckett, Edward White, John Hooper the elder, Samuel Farthing, John Hooper the younger, William Hooper the elder, William Newton the younger, James Percy, Henry Huff the elder, Henry Huff the younger, Benjamin Cholfey the younger, John Bell, George Spender the elder, James Anderson the younger, William Lambe, Joseph Lambe, Edward White, Robert Wyer, Mathew White the younger, Mathew Steevens, William White, Richard Ingram, Francis Ranger, William Percy, Elias Pitman, William Cuff the elder, Mathew White the elder, William Steevens, George

George Steevens, John Steevens the elder, James Steevens, John Steevens the elder, James Steevens, John Steevens the younger, John Wyer, Benjamin Cholfey the elder, William Ranger, Francis Chiverrall, Charles Wyer, James Wyer, John White, William Wyer, James Anderson the elder, John Beckett, Thomas Wyer, Luke Beckett the elder, Roger Spender, Robert Day, William Cuff the younger, Elias Steevens, James Steevens, William Gilham, Henry Savage, Charles Gilbert, Thomas Percy, John Ranger, Edward Percy, William Percy the younger, Robert Gilbert, William Dukes, Thomas Dukes, Roger Norton, Jos. Moody, James Gilbert, John Gane, Luke Mead, Nathaniel Philips, Joseph Norton, Samuel Norton, John Randsome, Thomas Brookes, Samuel Philips, Joseph Scamell, William Sandall the elder, Luke Maishment the younger, Luke Maishment the elder, John Maishment, William Sendle, James Burleigh, William Harden, Samuel Field, John Bowles, Robert Ranger, Thomas Lanham, John Richardson, William Spender, Henry Obourne, John Penny, Richard Rittman, William Nisbeck, James Davis, Joseph Gilbert, James Gough, James Wire, John Gilbert, and John Stevens, respectively, each and every of them then and there, and until and at the time of the said election having a right to vote at and in the election of burgesses to serve as burgesses for the said borough of Hindon in the Parliament of this kingdom, another large sum of money

(to wit) the sum of five guineas of like lawful money, as a bribe and reward to each of them the said several persons last-mentioned having such right to vote as aforesaid, to engage, corrupt, and procure the said persons respectively to give their respective votes at and in the then next election of burgesses to serve as burgesses for the same borough in the said then next Parliament of this kingdom, for him the said Richard Smith, in order that he the said Richard Smith might be elected a burgess to serve for the said borough in the said then next Parliament of this kingdom, to the great obstruction and hindrance of a free, quiet, indifferent, and unbiaſſed election of burgesses to serve in Parliament as burgesses for the same borough, in violation and subversion of the constitution of this kingdom, and of the liberties and privileges of the subjects thereof, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lord the King, his crown and dignity : And the said Attorney General of our said Lord the King, for our said Lord the King, gives the court here further to understand and be informed, that the said Richard Smith, being such person as aforesaid, and again unlawfully, wickedly, and corruptly intending (as much as in him the said Richard Smith lay) to interrupt and prevent the free and indifferent election of burgesses to serve as burgesses for the same borough in the Parliament of this kingdom, and by illegal and corrupt

rupt means to procure himself to be elected a bur-  
 gess to serve as a burges for the said borough, in  
 Parliament; he the said Richard Smith, before the  
 said election, (to wit) *on the eighth day of October*,  
 in the fourteenth year aforesaid, at the borough of  
 Hindon aforesaid, in the said county of Wilts, did  
 unlawfully, wickedly, and corruptly give, and cause  
 and procure to be given, to divers other persons,  
 namely, Joseph Norton, Jos. Cusse, John Edwards,  
 labourer, William Stevens, John Marshman, John  
 Edwards, glazier, John Larkham, Renalder Bowles,  
 Joseph Cholfey the younger, John Davis the elder,  
 Richard Erwood, William Chiverall, Samuel Daw,  
 Thomas Harden, James Edwards, Joseph Cholfey  
 the elder, Thomas Spencer, Henry Osborne, John  
 Penny, James Smart, John Randle, Edward Ran-  
 ger, Stephen Harding, John Dewey, William Snook,  
 Harry Jukes, Edward Beckett, Richard Pitman,  
 Thomas Wier, Isaac Moody, William Hacker, John  
 Bishop, Edward Halliday, Waler Beckett, George  
 Spender the younger, John Chiverall, John Dukes  
 the elder, John Dukes the younger, Robert Wier,  
 Moses Weeks, George Dukes, Thomas Steevens,  
 William Spender, John Hart, George Hayward, Ed-  
 ward Tulick, Mathew Davis, John Ingram the  
 younger, Philip Beckett the younger, Andrew  
 Farrett, Henry Jerrard, William Brookes, John  
 Gilbert, John Steevens, Elias Steevens, John  
 Davis, Thomas Howell, William Day, Walter



Piercy, John Beckett, Edward Shergold, Benjamin Beckett, Edward White, John Hooper the elder, Samuel Farthing, William Newton, William Nesbit, John Hooper the younger, William Lucas, William Newton the younger, James Piercy, William Abraham, Henry Huffer the elder, Henry Huffer the younger, John Moore, Benjamin Cholsey the younger, John Bell, George Spender, James Anderson, William Lambe, Joseph Lambe, Edward White, Robert Wyer, Mathew White the younger, Mathew Stevens, William White, Richard Ingram, Francis Ranger, Elias Pittman, William Cuffe, Matthew White, William Steevens, George Steevens, John Steevens the elder, James Steevens, John Steevens the younger, John Wyer, Benjamin Cholsey the elder, William Ranger, Thomas Steevens, Francis Chiverell, Charles Wier, John White, William Wyer, James Anderson, John Beckett, Thomas Wier, Luke Beckett, Roger Spender, Robert Day, John Nairn, William Cuff, Elias Steevens, James Steevens, Isaac Savage, William Gilham, Archibald Hunter, Henry Savage, James Lambert, John Steevens, James Cuffe, Jervoise Gilbert, Thomas Piercy, John Ranger, Edward Piercy, Robert Gilbert, Thomas Lanham, Jos. Gilbert, John Richardson, William Dukes, Richard Smith, Henry Lambert, James Warne, Thomas Dukes, Roger Norton, Joseph Moody, James Davis, James Gilbert, Thomas Philips, John Gane, Luke Mead, Nathaniel Phillips,

Phillips, Joseph Norton, Samuel Norton, John Ransome, Thomas Brookes, Thomas Harden, John Harden, Samuel Phillips, Jos. Scammell, William Sandle the elder, Luke Marshman the younger, James Goffe, Luke Marshman the elder, John Marshman, Richard Harden, William Sanddle the younger, James Burleigh, William Harden, Thomas Field, Samuel Field, Richard Beckett, and Robert Ranger, respectively, each and every of them then and there respectively having a right to vote in the election of burgeses to serve for the same borough in the Parliament of this kingdom, a large sum of money, to wit, the sum of five guineas of like lawful money, as a bribe and reward to engage, corrupt, and procure the said several last-mentioned persons respectively to give their respective votes in the election of burgeses, to serve as burgeses for the same borough in the said then next Parliament of this kingdom, for him the said Richard Smith, in order that he the said Richard Smith might be elected and returned a burges to serve for the said borough in the said then next Parliament of this kingdom; by means whereof the said several persons last above-named, who had such right to vote as aforesaid, were respectively tempted, corrupted, and procured to give, and did give their votes at and in the said election so had and made as aforesaid, for the said Richard Smith, for the purpose aforesaid; that is to say, at the borough of Hindon aforesaid, in the said county of Wilts, to the great obstruction

struction and hindrance of a free, quiet, indifferent, and unbiassed election of burgesſes to ſerve in Parliament for the ſame borough, in violation and ſubverſion of the conſtitution of this kingdom, and of the liberties and privileges of the ſubjects thereof, to the evil and pernicious example of all others in the like caſe offending, and againſt the peace of our ſaid Lord the King, his crown and dignity : And the ſaid Attorney General of our ſaid Lord the King, for our ſaid Lord the King, gives the court here further to underſtand and be informed, that the ſaid Richard Smith, well knowing the premiſes, but being ſuch perſon as aforeſaid, and again unlawfully, wickedly, and corruptly intending, as much as in him the ſaid Richard Smith lay, to interrupt and prevent the free and indifferent election of burgesſes to ſerve as burgesſes for the ſame borough in the Parliament of this kingdom, and by illegal and corrupt means to procure himſelf to be elected to ſerve as a burgeſs for the ſaid borough in the Parliament of this kingdom, the ſaid Richard Smith, before the ſaid election, (to wit) *on the ſaid 8th day of October*, in the 14th year aforeſaid, at Hindon aforeſaid, in the ſaid county of Wilts, unlawfully, wickedly, and corruptly did give, and cauſe and procure to be given, to divers other perſons, namely, Thomas Moore, Charles Simpson, John Baldwin, Jeremiah Lucas, Robert Tyley, Thomas Farrell, Joſeph Norton, Joſeph Kirk, John Edwards, William Stephens, John Maiſhment, John Larkham, Renalder Bowles, Joſeph Cholfey the younger,

younger, John Davis the elder, Richard Erwood,  
 William Cheverall, Samuel Daw, Thomas Harden,  
 James Edwards, Joseph Cholsey the elder, Thomas  
 Spencer, James Smart, John Randall, Edward Ran-  
 ger, John Dewey, Luke Beckett, Philip Beckett,  
 Henry Dukes, Edward Beckett, Isaac Moody,  
 William Hacker, John Bishop, Edward Hollowday,  
 George Spender the younger, John Chiverall, John  
 Dukes the Elder, John Dukes the younger, Robert  
 Wyer, Moses Weeks, George Dukes, George Hay-  
 ward, Edward Trewlock, Matthew Davis, Philip  
 Beckett the younger, Henry Jerrett, John Davis the  
 younger, William Day, Samuel Collier, Walter  
 Piercy, Edward Shergold. Benjamin Beckett, Ed-  
 ward White, John Hooper the elder, Samuel Far-  
 thing, John Hooper the younger, William Newton  
 the elder, William Newton the younger, James  
 Piercy, Henry Huffle the elder, Henry Huffle the  
 younger, Benjamin Cholsey the younger, John Bell,  
 George Spender the elder, James Anderson the  
 younger, William Lambe, Jos. Lambe, Edward  
 White, Robert Wyer, Matthew Whyte the younger,  
 Mathew Steevens, William White, Richard Ingram,  
 Francis Ranger, William Percy, Elias Pitman,  
 William Cuff the elder, Mathew White the elder,  
 William Steevens, George Steevens, John Steevens  
 the elder, James Steevens, John Steevens the younger,  
 John Wyer, Benjamin Cholsey the elder, William  
 Ranger, Francis Chiverall, Charles Wyer,  
 James

James Wyer, John White, William Wyer, James Anderson the elder, John Beckett, Thomas Wyer, Luke Beckett the elder, Roger Spender, Robert Day, William Cuff the younger, Elias Steevens, James Steevens, William Gilham, Henry Savage, Jarvis Gilbert, Thomas Percy, John Ranger, Edward Percy, William Percy the younger, Robert Gilbert, William Dukes, Thomas Dukes, Roger Norton, Joseph Moody, James Gilbert, John Gane, Luke Mead, Nathaniel Phillips, Joseph Norton, Samuel Norton, John Ransome, Thomas Brookes, Samuel Phillips, Joseph Scamel, William Sandall the elder, Luke Maishment the younger, Luke Maishment the elder, John Maishment, William Sendle, James Burleigh, William Harden, Samuel Field, John Bowles, Robert Ranger, Thomas Lanham, John Richardson, William Spender, Henry Obourne, John Penny, Richard Pittman, William Nisbeck, James Davis, Joseph Gilbert, James Gough, James Wire, John Gilbert, and John Steevens, respectively, each and every of them, then and there, and until and at the time of the said election so had and made as aforesaid, claiming a right to vote in the election of burgesses to serve for the said borough in the Parliament of this kingdom, a large sum of money, to wit, the sum of five guineas, of like lawful money, as a bribe and reward to engage, corrupt, and procure the said several persons so claiming a right to vote as aforesaid respectively, to give their respective votes at the said election of burgesses to serve in Parliament for the same borough, for him the  
said



said Richard Smith, in order that he the said Richard Smith might be elected and returned a burges to serve for the said borough in the said then next Parliament of this kingdom, to the great obstruction and hindrance of a free, quiet, and indifferent election of burgeses to serve in Parliament for the same borough, in violation and subversion of the constitution of this kingdom, and of the liberties and privileges of the subjects thereof, to the evil and pernicious example of all others in the like case offending, and against the peace of our said Lord the King, his crown and dignity : And the said Attorney General of our said Lord the King, for our said Lord the King, gives the court here further to understand and be informed, that the said borough of Hindon, in the said county of Wilts, is an ancient borough, and for a long space of time two burgeses have been elected and sent, and of right ought to be elected and sent, to serve for the said borough in the Parliament of this kingdom, to wit, at the borough of Hindon aforesaid, in the said county of Wilts : And the said Attorney General of our said Lord the King, for our said Lord the King, gives the court here further to understand and be informed, that the said Richard Smith, being a person of a depraved, corrupt, and wicked mind and disposition, and unlawfully and wickedly intending, as much as in him the said Richard Smith lay, to prevent and interrupt the free and indifferent election of burgeses to serve for the same borough in the Parliament of this kingdom, and by illegal and corrupt means to procure himself to be elected to serve as a burges for the said borough



borough in the Parliament of this kingdom, *on the eighth day of October*, in the 14th year aforesaid, at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly did give, and cause and procure to be given, to divers persons, namely, Jeremiah Lucas, Thomas Moore, Charles Simpson, John Baldwin, Jeremiah Lucas, Robert Tyley, Thomas Farrell, Jos. Norton, Jos. Cuff, John Edwards, William Steevens, John Maishment, John Larkham, Renalder Bowles, Joseph Cholfey the younger, John Davis the elder, Richard Erwood, William Chiverall, Samuel Daw, Thomas Harden, James Edwards, Jos. Cholfey the elder, Thomas Spencer, James Smart, John Randle, Edward Ranger, John Dewey, Luke Beckett, Philip Beckett, Henry Dukes, Edward Beckett, Isaac Moody, William Hacker, John Bishop, Edward Hollowday, George Spender the younger, John Chiverall, John Dukes the elder, John Dukes the younger, Robert Wyer, Moses Weeks, George Dukes, George Hayward, Edward Trewlock, Matthew Davis, Philip Beckett the younger, Henry Jerrett, John Davies the younger, William Day, Samuel Collier, Walter Percy, Edward Shergold, Benjamin Beckett, Edward White, John Hooper the elder, Samuel Farthing, John Hooper the younger, William Newton the elder, William Newton junior, James Percy, Henry Huff the elder, Henry Huff the younger, Benjamin Cholfey the younger, John Bell, George Spender the elder, James Anderson the younger, William Lambe,  
Joseph

Joseph Lambe, Edward White, Robert Wyer, Mathew White the younger, Mathew Steevens, William White, Richard Ingram, Francis Ranger, William Percy, Elias Pittman, William Cuff the elder, Mathew White the elder, William Steevens, George Steevens, John Steevens the elder, James Steevens, John Steevens the younger, John Wyer, Benjamin Cholfey the elder, William Ranger, Francis Cheverall, Charles Wyer, James Wyer, John White, William Wyer, James Anderson the elder, John Beckett, Thomas Wyer, Luke Beckett the elder, Roger Spender, Robert Day, William Cuff the younger, Elias Steevens, James Steevens, William Gilham, Henry Savage, Jarvis Gilbert, Thomas Percy, John Ranger, Edward Penny, William Percy the younger, Robert Gilbert, William Dukes, Thomas Dukes, Roger Norton, Jos. Moody, James Gilbert, John Gane, Luke Mead, Nathaniel Phillips, Jos. Norton, Samuel Norton, John Ransome, Thomas Brooks, Samuel Philips, Jos. Scamell, William Sandall the elder, John Maishment the younger, Luke Maishment the elder, John Maishment, William Sendell, James Burleigh, William Harden, Samuel Field, John Bowles, Robert Ranger, Thomas Lanham, John Richardson, William Spender, Henry Obourne, John Penny, Richard Pittman, William Nisbeck, James Davis, Jos. Gilbert, James Gough, James Wire, John Gilbert, John Steevens, respectively, each and every of them then and there having a right to vote at and in the election of burgesses

gesſes to ſerve for the ſame borough in the Parliament of this kingdom, another large ſum of money (to wit), the ſum of five guineas of like lawful money, as a bribe and reward to engage, corrupt, and procure the ſaid ſeveral laſt-mentioned perſons reſpectively to give their reſpective votes at and in the then next election of burgeſſes to ſerve in Parliament for the ſame borough, for him the ſaid Richard Smith, in order that he the ſaid Richard Smith might be elected and returned a burgeſs to ſerve for the ſaid borough, at the then next election of burgeſſes to ſerve in the Parliament of this kingdom, to the great obſtruction of a free, indifferent, and unbiassed election of burgeſſes to ſerve in Parliament for the ſame borough, in violation and ſubverſion of the conſtitution of this kingdom, and of the liberties and privileges of the ſubjects thereof, to the evil and pernicious example of all others in the like caſe offending, and againſt the peace of our ſaid Lord the King, his crown and dignity: And the ſaid Attorney General of our ſaid Lord the King, for our ſaid Lord the King, giveth the court here further to underſtand and be informed, that the ſaid Richard Smith, being ſuch perſon as aforeſaid, and again unlawfully and wickedly intending, as far as in him lay, to interrupt and prevent the free and indifferent election of burgeſſes to ſerve for the ſaid borough of Hindon in the Parliament of this kingdom, and by illegal and corrupt means to procure himſelf to be elected and returned to ſerve as a burgeſs for the ſaid borough in  
the

the Parliament of this kingdom, he the said Richard Smith, *on the 10th day of October*, in the 14th year aforesaid, at the borough of Hindon aforesaid, in the said county of Wilts, unlawfully, wickedly, and corruptly did lend, and cause and procure to be lent, to divers other persons, namely, Thomas More, Charles Simpson, John Baldwin, Jeremiah Lucas, Robert Tyley, Thomas Farrell, Jos. Norton, Joseph Kirk, John Edwards, William Stephens, John Maishment, John Larkham, Renalder Bowles, Jos. Cholfey the younger, John Davies the elder, Richard Erwood, William Cheverall, Samuel Daw, Thomas Harden, James Edwards, Jos. Cholfey the elder, Thomas Spencer, James Smart, John Randall, Edward Ranger, John Dewey, Luke Beckett, Philip Beckett, Henry Dukes, Edward Beckett, Isaac Moody, William Hacker, John Bishop, Edward Hollowday, George Spender the younger, John Cheverall, John Dukes the elder, John Dukes the younger, Robert Wyer, Moses Weeks, George Dukes, George Hayward, Edward Trewlock, Matthew Davis, Philip Beckett the younger, Henry Jerrett, John Davis the younger, William Day, Samuel Collier, Walter Percy, Edward Shergold, Benjamin Beckett, Edward White, John Hooper the elder, Samuel Farthing, John Hooper the younger, William Newton the elder, William Newton the younger, James Percy, Henry Huff the elder, Henry Huff the younger, Benjamin Cholfey the younger, John Bell, George Spender the elder, James Ander-

son the younger, William Lambe, Jos. Lambe, Edward White, Robert Wyer, Mathew White the younger, Mathew Steevens, William White, Richard Ingram, Francis Ranger, William Percy, Elias Pittman, William Cuffe the elder, Mathew Whyte the elder, William Steevens, George Steevens, John Steevens the elder, James Steevens, John Steevens the younger, John Wyer, Benjamin Cholfey the elder, William Ranger, Francis Cheverall, Charles Wyer, James Wyer, John Whyte, William Wyer, James Anderson the elder, John Beckett, Thomas Wyer, Luke Beckett the elder, Roger Spender, Robert Day, William Cuff the younger, Elias Steevens, James Steevens, William Gilham, Henry Savage, Jarvis Gilbert, Thomas Percy, John Ranger, Edward Percy, William Percy the younger, Robert Gilbert, William Dukes, Thomas Dukes, Roger Norton, Joseph Moody, James Gilbert, John Gane, Luke Mead, Nathaniel Philips, Joseph Norton, Samuel Norton, John Ransome, Thomas Brookes, Samuel Philips, Joseph Scamell, William Sandall the elder, Luke Maishment the younger, Luke Maishment the eldet, John Maishment, William Sendle, James Burleigh, William Harden, Samuel Field, John Bowles, Robert Ranger, Thomas Lanhams, John Richardson, William Spender, Henry Obourne, John Penny, Richard Pittman, William Nesbick, James Davis, Joseph Gilbert, James Gough, James Wire, John Gilbert, and John Steevens, respectively, each and every of them then



and there having a right to vote at and in the election of burgesſes to ſerve in Parliament for the ſame borough, a large ſum of money, to wit, five guineas of lawful money of Great Britain, as a bribe and reward to engage, corrupt, and procure the ſaid ſeveral perſons laſt above-named, having a right to vote as aforeſaid, reſpectively to give their reſpective votes in the then next election of burgesſes to ſerve for the ſaid borough in the Parliament of this kingdom, for the ſaid Richard Smith, in order that he the ſaid Richard Smith might be elected and returned a burgeſs to ſerve for the ſaid borough in the then next Parliament of this kingdom, to the great obſtruction and hindrance of a free, indifferent, and unbiassed election of burgesſes to ſerve in Parliament for the ſame borough, in violation and ſubverſion of the conſtitution of this kingdom, and of the liberties and privileges of the ſubjects thereof, to the evil and pernicious example of all others in the like caſe offending, and againſt the peace of our ſaid Lord the King, his crown and dignity: Whereupon the ſaid Attorney General of our ſaid Lord the King, who for our ſaid Lord the King in this behalf proſecuteth, for our ſaid Lord the King prayeth the conſideration of the court here in the premiſes, and that due proceſs of law may be awarded againſt him the ſaid Richard Smith in this behalf, to make him answer to our ſaid Lord the King touching and concerning the premiſſes aforeſaid: Wherefore the ſheriff



of the said county of Wilts was commanded that he should not forbear by reason of any liberty in his bailiwick, but that he should cause him to come to answer to our said Lord the King touching and concerning the premisses aforesaid. And now (that is to say) on Tuesday next after the octave of Saint Hilary, in the same term, before our said Lord the King at Westminster cometh the said Richard Smith, by William Sidgwick his attorney, and having heard the said information read, he saith that he is “ *Not* “ *Guilty*” thereof, and hereupon he putteth himself upon the country; and the aforesaid Edward Thurlow, Esquire, who prosecuteth for our said Lord the King in this behalf, doth the like: Therefore let a jury thereupon come before our said Lord the King, on the octave of the purification of the blessed Virgin Mary, wheresoever he shall then be in England, by whom the truth of the matter may be the better known, and who are not of the kindred of the said Richard Smith, to try upon their oath whether the said Richard Smith be guilty of the premisses aforesaid or not: Because as well the said Edward Thurlow, Esquire, who prosecuteth for our said Lord the King in this behalf, as the said Richard Smith, have thereupon put themselves upon the said jury, the same day is given as well to the said Edward Thurlow, Esquire, who prosecuteth for our said Lord the King in this behalf, as to the said Richard Smith; at which said time, (to wit) on the octave of the purification  
of

of the blessed Virgin Mary aforesaid, before our said Lord the King at Westminster come as well the said Edward Thurlow, Esquire, who prosecuteth for our said Lord the King in this behalf, as the said Richard Smith by his Attorney aforesaid: And the sheriff of the said county of Wilts returned the names of twelve jurors, none of whom come to try in form aforesaid, therefore the sheriff of the said county of Wilts is commanded that he do not forbear by reason of any liberty in his Bailiwick, but that he distrain the jurors last aforesaid by all their lands and chattles in his bailiwick, so that neither they, nor any one for them, do put their hands to the same, until he shall have another command from our said Lord the King for that purpose, and that he answer to our said Lord the King for the issues thereof, so that he may have their bodies before our said Lord the King, in fifteen days from the feast day of Easter, wheresoever he shall then be in England, or before the Justices of our said Lord the King assigned to hold the assizes in and for the said county of Wilts, if they shall come before that time (that is to say) on Saturday the ninth day of March next, at New Sarum, in the said county, according to the form of the statute in that case made and provided, to try upon their oath whether the said Richard Smith be guilty of the premisses aforesaid or not, in default of the jurors aforesaid who came not to try in form aforesaid; therefore let the sheriff of the said county have the bodies of the same jurors

accordingly to try in form aforesaid: The same day is given, as well to the said Edward Thurlow, Esquire, who prosecuteth for our said Lord the King in this behalf, as to the said Richard Smith; at which time, to wit, in fifteen days from the feast day of Easter aforesaid, before our said Lord the King at Westminster come as well the said Edward Thurlow, Esquire, who prosecuteth for our said Lord the King in this behalf, as the said Richard Smith by his Attorney aforesaid: And the aforesaid Justices of Assize, before whom the said jury came to try in form aforesaid, sent here their record had before them in these words; (that is to say) afterwards, on the day and at the place last within mentioned, before Sir James Eyre, Knight, and Sir Beaumont Hotham, Knight, two of the Barons of his Majesty's court of Exchequer, Justices of our said Lord the King assigned to hold the Assizes in and for the county of Wilts within mentioned, according to the form of the statute in such case made and provided, come as well the within named Edward Thurlow, Esquire, who prosecuteth for our said Lord the King in this behalf, as the within named Richard Smith by his Attorney within mentioned; and the jurors of the jury, whereof there is mention within made, being called, some of them (to wit) William Bennet, of Norton Bavant, Esquire, Richard Southby, of Bulford, Esquire, William Hayter, of Newton Toney, Esquire, Tho-

mas Moore, of Durrington, Esquire, Francis Dugdale Astley, of Everley, Esquire, and John White-lock, of Eastridge, Esquire, come and are sworn upon the said jury; and because the rest of the said jury do not appear, therefore others of the bystanders, being chosen for this purpose by the sheriff of the said county at the request of the said Edward Thurlow, Esquire, by the command of the said Justices are anew appointed, whose names are affixed in the pannel within written, according to the form of the statute in such case made and provided; and the jurors so anew appointed as aforesaid, to wit, James Hancock, of Smallbrook, Edward Bracher, of Stockton, John Ferris, of Warminster, John Ford, of Potterne, John Jerrard, of Funthill Gifford, and William Lawrence, of Alderbury, being called, likewise come and are sworn upon the said jury; and thereupon public proclamation being made for our said Lord the King, as the custom is, that if any one will inform the Justices aforesaid, the King's Serjeant at Law, the King's Attorney General, or the jurors of the jury aforesaid, concerning the matters within contained, he should come forth, and should be heard: And hereupon Nash Grose, Serjeant at Law, offereth himself on the behalf of our said Lord the King to do this; Whereupon the court here proceedeth to take the said inquest by the jurors aforesaid, now here appearing for the purpose aforesaid; who being elected, tried, and sworn to speak the truth concerning the matters within contained,

say upon their oath that the said Richard Smith *is guilty* of the premisses, in the information within specified and charged upon him, in manner and form as in and by the said information is within alleged against him."

The other three informations, were, in point of form, entirely the same with this.

S U P P L E M E N T

TO THE

CASE OF SHAFTESBURY.

VOL. II. CASE XIX.



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# S U P P L E M E N T

T O T H E

C A S E O F S H A F T E S B U R Y .

V O L . I I . C A S E X I X .

**O**N Thursday, the 4th of May, 1775, the House had resolved, That it would be highly expedient to take the minutes, of the examination taken before the Committee who tried this cause, into consideration, as early as possible in the next session of Parliament (1).

On Thursday, the 2d of November, 1775, which was the 8th day of the ensuing session, all the resolutions of the House,

(1) *Supra*, vol. ii. p. 313.

of the 4th of May, relative to this cause, such as they have been stated in the history of the case (1), were read (2); and then the House came to a resolution, That they would, on Thursday, the 1st day of February, 1776, take the minutes of the examination taken before the Committee into consideration (3).

At the same time, orders were made, severally, That thirteen persons, therein named, should attend the House, on the 1st of February (4).

And the following order was made :

Ordered, " That Mr. Speaker do not  
 " issue his warrant, for the making out a  
 " new writ, for the electing of a burges,;  
 " to serve in Parliament, for the borough  
 " of Shafton, otherwise Shaftesbury, be-  
 " fore the 1st day of February next (5)."

Thursday, the 25th of January, 1776.—  
 The order for taking the minutes of the

(1) *Supra*, vol. ii. p. 311, to 313.

(2) Votes, p. 42, 43.

(3) *Ibid.* p. 43.

(4) *Ibid.*

(5) *Ibid.*

Committee into consideration on the 1st of February, was discharged, and a new order made, for taking them into consideration on Wednesday the 14th of that month (1).

At the same time, a joint order was made, for the attendance, on the 14th, of the persons who had been severally ordered to attend the House on the 2d (2).—This joint order was renewed, afterwards, whenever the further consideration of this business was adjourned to a subsequent day.

On Wednesday, the 14th of February, the order of the day for that purpose being read, the House entered on the consideration of the minutes of the Committee; and, as the proceedings of that day gave occasion to much subsequent debate, and there has been a great diversity of opinion with regard to the propriety of them, it will be proper to set forth the account of

(1) *Votes*, p. 298.

(2) *Ibid.*

them at large, as it is entered in the Votes.

“ The House proceeded to take into  
 “ consideration, the minutes of the exa-  
 “ mination taken before the select Com-  
 “ mittee, who were appointed, in the last  
 “ session of Parliament, to try and deter-  
 “ mine the merits of the petition of Hans  
 “ Wintrop Mortimer, Esquire, complain-  
 “ ing of an undue election and return,  
 “ for the borough of Shafton, otherwise  
 “ Shaftesbury, in the county of Dor-  
 “ set.

“ The House was moved, That the  
 “ proceedings of the House, of the 25th  
 “ day of April, and the 4th day of May,  
 “ in the last session of Parliament, upon  
 “ the report which was made from the  
 “ said select Committee, might be read.

“ And the same were read accord-  
 “ ingly.

“ And several parts of the said minutes  
 “ were also read.

“ Resolved,

“ Resolved, *nemine contradicente*,

“ That it appears to this House, by the  
 “ minutes of the select Committee, ap-  
 “ pointed to try the merits of the election  
 “ of members to serve in Parliament, for  
 “ the borough of Shaftesbury, and which  
 “ have been laid before this House, that  
 “ there was the most notorious suborn-  
 “ ation of perjury practised, and the  
 “ most corrupt and wilful perjury com-  
 “ mitted, at the last election for members  
 “ to serve in Parliament, for the borough  
 “ of Shaftesbury, in the county of Dor-  
 “ set.

“ A motion was made, and the question  
 “ being *proposed*, That it appears to this  
 “ House, from the said minutes, that  
 “ Francis Sykes, Esq; was a principal  
 “ promoter, and suborner of the said cor-  
 “ rupt and wilful perjury ;

“ A motion was made, and the question  
 “ being *put*, That the further consider-  
 “ ation of the said minutes be adjourned  
 “ till



“ till this day fortnight, the 28th day of  
 “ this instant February;

“ It passed in the negative.

“ Resolved, That it appears to this  
 “ House, from the said minutes, that  
 “ Francis Sykes, Esq; was a principal  
 “ promoter and suborner of the said cor-  
 “ rupt and wilful perjury.

“ Resolved, That it appears to this  
 “ House, from the said minutes, that Tho-  
 “ mas Rumbold, Esquire, was a principal  
 “ promoter and suborner of the said cor-  
 “ rupt and wilful perjury.

“ Resolved, That it appears to this  
 “ House, from the said minutes, that  
 “ John Good was a principal promoter,  
 “ and suborner of the said corrupt and  
 “ wilful perjury.

“ Resolved, That it appears to this  
 “ House, from the said minutes, that  
 “ William Bennet was a principal pro-  
 “ moter, and suborner of the said corrupt  
 “ and wilful perjury.

“ Resolved,

“ Resolved, That it appears to this  
“ House, from the said minutes, that  
“ William Armstrong was a principal  
“ promoter, and suborner of the said  
“ corrupt and wilful perjury.

“ Resolved, That it appears to this  
“ House, from the said minutes, that  
“ Matthew Merefield was a principal pro-  
“ moter, and suborner of the said corrupt  
“ and wilful perjury.

“ Resolved, That it appears to this  
“ House, from the said minutes, that  
“ William Pope was a principal promoter,  
“ and suborner of the said corrupt and  
“ wilful perjury.

“ Resolved, That it appears to this  
“ House, from the said minutes, that  
“ Thomas Hannam was a principal pro-  
“ moter, and suborner of the said corrupt  
“ and wilful perjury.

“ Ordered, That the Attorney General  
“ do forthwith prosecute the said Francis  
“ Sykes, Thomas Rumbold, John Good,  
“ William Bennet, William Armstrong,

“ Matthew Merefield, William Pope, and  
 “ Thomas Hannam, for the said of-  
 “ fence.

“ Ordered, That leave be given to bring  
 “ in a bill, to disfranchise, and incapac-  
 “ itate certain persons, therein to be men-  
 “ tioned, from voting at elections of mem-  
 “ bers to serve in Parliament, and for pre-  
 “ venting bribery and corruption in the  
 “ election of members to serve in Parlia-  
 “ ment for the borough of Shaftesbury,  
 “ in the county of Dorset; and that Sir  
 “ George Yonge, Mr. Hungerford, Mr.  
 “ William Drake *junior*, Mr. Dashwood,  
 “ Mr. Annesley, Sir George Robinson, Mr.  
 “ George Venables Vernon, Mr. Abel  
 “ Smith, Mr. Asheton Curzon, Mr. Sut-  
 “ ton, Mr. Holt, Sir John Duntze, Sir  
 “ Richard Worfeley, Lord Guernsey, Mr.  
 “ George Clive, Mr. Dunning, and Mr.  
 “ Serjeant Adair, do prepare, and bring in,  
 “ the same (1).”

(1) Votes, p. 327, 328.

The

The foregoing resolutions, that the two candidates who had been returned, and the other persons therein mentioned, had been guilty of subornation of perjury, and the orders for prosecuting them for that offence, were warmly opposed on several grounds.

In the first place, it was contended, That it was improper, and unjust, for the House to declare the parties guilty, when there had been no evidence given, nor witnesses examined, in the House, to support the charge, and no opportunity given to the accused, to produce witnesses to prove their innocence.

The answer to this objection was, That the House might, with the same propriety, give credit to the account of the evidence which had been produced to the Committee, as contained in the minutes, as the courts of Westminster-hall do to the report of a judge, of the evidence given on the trial of a cause before him ; and that it had been the uniform practice for the House,

merely on the evidence given in Committees, and reported to them, to proceed to censures, and even punishment. That the Journals are full of instances, of returning officers, and other persons, committed by the House, on reports from the Committee of elections, of evidence of the misconduct of such persons given before them, without any new evidence being produced to the House. That, even since the establishment of the new judicature, there had been examples of persons punished for prevarication and misbehaviour before a Committee, on the mere report of the Chairman of such Committee; and that, on such occasions, it had never been imagined that the House ought first to have called for evidence at their own bar, to prove the prevarication, and misbehaviour (1). That much more reliance was to be had on the testimony given before a Committee, by witnesses, sworn to speak the truth, and

(2) *Vide supra*, vol. i. p. 88, to 90. Vol. iii. p. 166, 167.

liable, in case of perjury, to the penalties of the law (1), than to what persons, not upon oath, might say at the bar of the House.

In the next place it was contended, That the evidence, on which the charge of subornation of perjury was founded, as contained in the minutes of the Committee, was not sufficient to support the charge, or justify the proposed resolutions.

That part of the minutes, on which the resolutions against Sykes and Rumbold were founded, is in the evidence given by one Henry Waite (a tin-plate worker, and servant to John Good), on the first of April; and is as follows :

“ The night before the poll I had conversation with Sykes and Rumbold at my master’s shop. — Sundry people came there to regale themselves on that behalf; a little bit of feast made by my master.

“ Sykes and Rumbold, my master and Merefield, came in; and Merefield said,

(1) 10 Geo. III. cap. 16. § 29.



“ he hoped he should see them *in as good*  
 “ *spirits* next day.—Sundry doubted about  
 “ the oath.—Sykes and Rumbold said, *they*  
 “ *might take the oath very safely.*—Both said  
 “ *so.*—When Sykes and Rumbold came out  
 “ with my master to go round the street  
 “ again, Rumbold and Good (the master)  
 “ went out first—Sykes, last coming out,  
 “ says to me, *You may depend on it, it is not*  
 “ *my money*—I said, very well—I wish you a  
 “ good-night.

“ It was imagined in the borough, that  
 “ the oath would be given next morning.—  
 “ The ground of doubt was, *as they had*  
 “ *taken some money*” (1).

(Here evidence about other matters intervenes.)

Being cross-examined, to what passed at his master's shop, on the night before the poll, he said,

“ — Sykes and Rumbold said, *they*  
 “ *might take the oath*—I don't know they

(1) *Vide* printed minutes, p. 27.

“ eat,

“ eat, or drank—I cannot be punctual who  
 “ said it first to the people then sitting—  
 “ *They were half drunk, or thereabouts.*—I  
 “ was a servant to attend them all night—I  
 “ was sober—*Sykes and Rumbold said, the*  
 “ *oath was nothing at all to them*—There  
 “ was no conversation between Sykes and  
 “ me—When he said the money was not  
 “ his—these were the last words he said  
 “ when he was coming out of the house  
 “ (1).”

(Here again evidence about other matters intervenes.)

“ Several people were in the room when  
 “ Sykes and Rumbold said, *they might*  
 “ *safely take the oath* (2).”

There were none of the other persons, said by Waite to have been present at this scene, called before the Committee, to corroborate what he swore concerning the conversation of Sykes and Rumbold.

(1) Printed minutes, p. 28.      (2) *Ibid.*

This evidence, it was said, was of such a nature as scarcely to deserve any credit, both because it was unsupported by any concurrent testimony, although, according to the witness's own account, there were sundry persons present; and because the witness owned that the supposed conversation passed in a riotous and drunken meeting, where it was not likely that he could have heard with much accuracy, or would pay a very nice attention to the expressions used by the two candidates.

A third objection to the orders for prosecuting the parties for *subornation* of perjury was this: That there had not been a trial and *conviction* of the persons said to have been perjured in consequence of the supposed subornation.

It was contended, That a suborner of perjury must be considered as an accessory before the fact, and that it is a general rule of law, that no person charged as an accessory shall be put on his trial, until the  
convic-

conviction of the principal. That this rule cannot be departed from, unless in some instances where particular exceptions from it have been introduced by act of Parliament; namely, by 1 Ann. cap. 9. § 1. in cases of felony, when, from particular circumstances enumerated in the statute, it is impossible that there should be a subsequent trial of the principal; and by § 2. of the same statute, in cases of receivers of stolen goods, knowing them to be stolen. That the reasons of the rule are, that, in the first place, unless the principal has committed the fact, there can be no accessory; as, for example, unless perjury has been committed, there can have been no *subornation*, and the only proper evidence that the fact has been committed, is the record of the conviction; and that, in the second place, if the accessory could be first tried, it might so happen, that he should be convicted one day, and the principal be acquitted the next, which would be absurd (1) (A).

(1) Hawk. Pleas of the Cr. Book ii. cap. 29. § 43, 44, 45. Black. Com. vol. i. p. 318, 319. 4to ed.

These, and other arguments, however weighty they appeared to many, did not prevail with the majority of the House on the 14th of February, when they came to the resolutions and orders which have been stated.

Informations were, in consequence of these orders of the House, prepared by the Attorney General, against all the persons specified in the orders; and were actually filed against Mr. Sykes and Mr. Rumbold.

The punishment for perjury, and subornation of perjury, is, at common law, the same: namely, fine, imprisonment, and the incapacity of being a witness ever afterwards (1). By the statute of 5 Eliz. cap. 9. the persons prosecuted thereon, for subornation of perjury, are punished with the perpetual incapacity of being a witness, and a fine of 40*l.*; and, in defect of *goods or chattels, lands or tenements*, to the value of 40*l.* they are to be imprisoned for half a year, and to stand in

(1) Co. 3. Inst. 163.

the pillory for an hour (1). Perjury, by the same statute, is punished with six months imprisonment, a fine of 20*l.*, and the perpetual incapacity of being a witness; and, in defect of *goods or chattels* to the value of 20*l.* then the offender to stand with both ears nailed to the pillory (2). In both cases, one half of the fine is to go to the King, and the other to the party injured by the perjury (3).

By the statute of 2 Geo. II. cap. 25. it is enacted,

“ That, besides the punishment already  
 “ to be inflicted *by law* for the crimes  
 “ of wilful and corrupt perjury, and sub-  
 “ ornation of perjury, it shall and may  
 “ be lawful for the court or judge, before  
 “ whom any person shall be convicted of  
 “ wilful and corrupt perjury, or suborna-  
 “ tion of perjury, *according to the laws now*  
 “ *in being*, to order such person to be sent  
 “ to some house of correction within the  
 “ same county, for a time not exceeding

(1) 5 Eliz. cap. 9. § 3, 4.      (2) § 7.      (3) § 8.

“ seven



“ seven years, there to be kept to hard labour  
“ during all the said time, or otherwise  
“ to be transported to some of his Majes-  
“ ty’s plantations beyond the seas, for a  
“ term not exceeding seven years, as the  
“ court shall think most proper; and there-  
“ upon judgment shall be given, that the  
“ person convicted shall be committed or  
“ transported accordingly, over and beside  
“ such punishment as shall be adjudged to  
“ be inflicted on such person, *agreeable to*  
“ *the laws now in being*; and, if transpor-  
“ tation be directed, the same shall be ex-  
“ ecuted in such manner as is or shall be  
“ provided by law for the transportation of  
“ felons; and if any person so committed  
“ or transported shall voluntarily escape or  
“ break prison, or return from transporta-  
“ tion before the expiration of the time  
“ for which he shall be ordered to be  
“ transported, as aforesaid, such person, be-  
“ ing thereof lawfully convicted, shall suf-  
“ fer death as a felon, without benefit of  
“ clergy, and shall be tried for such felony  
“ in

“ in the county where he so escaped, or  
“ where he shall be apprehended (1).”

The new penalties introduced by this act are made to attach, on conviction, whether the prosecution be at common law, or on the statute of 5 Eliz. When the prosecution is upon the statute of Elizabeth, great technical nicety is required in the proceedings (2) (B). Hence, it is usually carried on at common law (3).

“ Subornation of perjury (says Hawkins,  
“ in his Pleas of the Crown,) seems to be  
“ an offence in procuring a man to take  
“ a false oath amounting to perjury, *who*  
“ *actually takes such oath*; but it seemeth  
“ clear that, if the person incited to take  
“ such an oath, *do not actually take it*, the  
“ person by whom he was so incited is  
“ *not* guilty of subornation of perjury;  
“ yet it is certain that he is liable to be

(1) 2 Geo. II. cap. 25. § 2.

(2) Hawk. Pleas of the Crown, B. i. c. 69. § 17.

(3) Black. Comm. vol. iv. p. 137. 4to ed.

“ punished,

“ punished, not only by fine, but by infamous corporal punishment (1).”

With regard to this last offence, of inciting a person to commit perjury who, however, does not commit it, it is evident, that no previous conviction, is, or can be, necessary, as a ground for prosecuting the offender. As, therefore, there were such reasons for doubting whether prosecutions for subornation were competent, without an antecedent trial and conviction of the person suborned, it was thought proper, by the gentlemen concerned in advising and drawing the informations in question, to add, to the counts for subornation, others charging the defendants with this other offence of inciting the voters to perjury.

Wednesday, the 21st of February.—Sir George Yonge presented a bill of incapacitation, agreeable to the order of the 14th (2), which was ordered to be read a

(1) Hawk. Pl. of the Cr. B. i. cap. 69. § 10.

(2) *Supra*, p. 338.

second time on the 4th of March, and, in the mean time, it was ordered to be printed, and copies thereof, and of the order for the second reading, ordered to be served on the parties named in it; leaving such copies at the last place of their abode to be deemed good service (1).

Wednesday, the 28th of February,—  
 “ A petition of Thomas Rumbold, Esq;  
 “ was presented to the House, setting forth,  
 “ That the petitioner observes, by the  
 “ votes, that divers resolutions have been  
 “ come to, upon taking into consideration  
 “ the minutes of the examination taken  
 “ before the select Committee; who were  
 “ appointed, in the last session of Parlia-  
 “ ment, to try and determine the merits  
 “ of the petition of Hans Wintrop Mor-  
 “ timer, Esq; complaining of an undue  
 “ election and return for the borough of  
 “ Shaftesbury, and, in particular, a resolu-  
 “ tion, “ That it appeared to this House,

(1) Votes, p. 356.

“ from

“from the said minutes, that the petitioner was a principal promoter and sub-  
“orner of wilful and corrupt perjury at  
“the said election,” and that the petitioner *had not any information given him,*  
“that any proceedings were intended to be  
“had with respect to him; and, as the  
“petitioner is conscious of his innocence,  
“he trusts he should have been able, had  
“he been apprized of such proceedings, to  
“have satisfied the House, that there was  
“no foundation for so heinous a charge;  
“and that the petitioner’s character and  
“reputation is highly affected by the said  
“resolution; and therefore praying that  
“the House will grant him such relief in  
“the premises, as to them shall seem  
“meet (1).”

Then, upon a motion for that purpose, so much of the entries of the House in the votes of the proceedings of the 14th of February, as related to Mr. Rumbold, was read; after which a motion was made,

(1) Votes, p. 389, 390.

“That

“ That the order to the Attorney General for prosecuting Thomas Rumbold, Esquire, for the said offence, be discharged (1).”

This motion was supported, and enforced, by all those arguments, and objections to the order, which have been already stated (2). Great stress was particularly laid on the circumstance alleged in Mr. Rumbold's petition, that the motion for the resolution against him was made without his having received any notice to prepare himself to oppose it.

On the other hand, many, even of those who did not concur in the resolutions and orders for prosecution, nor indeed approve of them, were, however, strenuous in opposing the present motion; because it was almost (C) an unprecedented thing for the House, to annul proceedings of their own, in the same session in which those proceedings took place, and because they

(1) Votes, p. 390. (2) *Supra*, p. 339, to 346.



thought such an example would be very dangerous, as it would afford a pretext for similar applications and attempts, on almost every occasion, when any person should think himself aggrieved by what might have been resolved or ordered by the House; the consequence of which would be to delay and interrupt the whole course of parliamentary business.

The question being put, it passed in the negative (1); (On a division of 169, to 142.)

“ A motion was then made, and the  
 “ question put, That the petition of Tho-  
 “ mas Rumbold, Esquire, be referred to  
 “ the consideration of a Committee, to in-  
 “ quire into facts, and report the same,  
 “ with their opinion thereupon, to the  
 “ House.”

This likewise passed in the negative (2);  
 —(On a division of 143, to 136).

(1) Votes, p. 390.

(2) *Ibid.*

The petition was ordered to lie on the table (1).

After this, a petition of Mr. Sykes, in the very same terms with that of Mr. Rumbold, being presented; a motion was made, and the question put, that it should be referred to a Committee, to inquire into and report the facts; and their opinion upon them.

This passed in the negative (2),—(without a division).

Friday, the 1st of March.—A petition of one Charles Pinhorn, of the borough of Shaftesbury, was presented to the House, setting forth, That he was declared, by the bill of incapacitation then depending, to be disabled from voting at any election of members to serve in Parliament; and alleging, that, in the report made by the Committee to the House, he was not charged with bribery, or attempting to bribe any persons whatsoever;—Praying,

(1) Votes, p. 390.

(2) *Ibid.*

therefore, that he might be heard, by his counsel, against that part of the bill which respected him.

This petition was ordered to lie on the table, until the second reading of the bill (1).

The same day was presented another petition of certain persons, on behalf of themselves and others; observing, that they were disabled by the bill from ever voting for members of Parliament; alleging, that they conceived themselves to be thereby greatly aggrieved; and praying that they might be heard, by their counsel, against the bill, and that it might not pass into a law (2).

It was ordered that this petition should lie on the table till the second reading of the bill; and that, then, the petitioners, if they should think fit, might be heard, by their counsel, against it (3).

(1) Votes, p. 403.

(2) *Ibid.* p. 404.

(3) *Ibid.* p. 408.

Monday,

Monday, the 4th of March.—The order of the day for the second reading of the bill was discharged, and the day following appointed for that purpose (1).

Tuesday, the 5th of March.—The order of the day being read, and the House being informed that no counsel attended, the bill was read a second time, and that day se'nnight appointed for the whole House to go into a Committee upon it. All the persons mentioned in the orders of the 2d of November (2), (except one Foot and one Wilton,) were ordered to attend the Committee of the whole House; and separate orders were also made for the attendance of 16 other persons therein named, at the same time (3). These persons were afterwards included in the joint orders mentioned in the account of the proceedings on the 25th of January (4).

The two petitions, presented on the 1st of March, were ordered to be referred to the

(1) Votes, p. 413.

(2) *Supra*, p. 332.

(3) Votes, p. 421.

(4) *Supra*, p. 333.

Committee of the whole House, and leave given to the petitioners to be then heard against the bill, by themselves or their counsel (1).

Thursday, the 7th of March.—Several orders were made for 15 more persons, therein named, to attend the Committee of the whole House, on the Tuesday following (2). They likewise were afterwards included in the joint orders mentioned in the account of the proceedings on the 25th of January (3).

Tuesday, the 12th of March.—The order of the day being read, the Committee of the whole House was postponed till the Monday following (4).

Monday, the 18th of March.—The order of the day for that purpose being read, the House resolved itself into a Committee on the bill, Mr. Vernon being chairman; and,

(1) Votes, p. 421.

(2) Votes, p. 432.

(3) *Supra*, p. 333.

(4) Votes, p. 451.

after



after some time spent therein, the Speaker resumed the chair, and Mr. Vernon reported, That they had examined several witnesses, and had made some progress. The Thursday following was then appointed for proceeding again in the Committee of the whole House (1).

Thursday, the 21st of March.—The like proceedings took place as on the 18th; and the Tuesday following was then appointed for the Committee of the whole House (2).

Tuesday, the 26th of March.—The House having resolved itself into a Committee on the bill, after some time spent therein, the Speaker resumed the chair, and the House adjourned, without appointing any future day for continuing the proceedings (3).

On the ensuing day, (Wednesday, the 27th of March,) the Friday following was appointed for the Committee to sit again (4).

(1) Votes, p. 479.                      (2) Votes, p. 502, 503.

(3) Votes, p. 928. *Vide supra*, Supplement to the Case of Hindon, p. 277.

(4) Votes, p. 533.



Friday, the 29th of March.—The like proceedings took place as on the 26th (1).

Monday, the 1st of April.—The 22d of April was fixed for the House to resolve itself again into a Committee on the bill (2).

Thursday, the 18th of April.—The order fixing the 22d was discharged, and the 29th of April fixed for the Committee of the whole House to sit again (3).

Monday, the 29th of April.—The like proceedings were had as on the 18th of March (4), and the Friday following fixed for the Committee to sit again (5).

Friday, the 3d of May.—The order of the day being read, and the House having gone into the Committee, after some time, the Speaker resumed the chair, and the following resolution was come to :

Resolved, “ That this House will *im-*  
“ *mediately* resolve itself into a Committee

(2) Votes, p. 543.

(2) Votes, p. 552.

(3) Votes, p. 577.

(4) *Supra*, p. 359.

(5) Votes, p. 621.

“ of the whole House to consider of the  
“ said bill.”

The House, however, adjourned immediately,—there not being 40 members present (1).

Monday, the 5th of May.—“ A motion  
“ was made, and the question being put,  
“ that this House will, *upon this day three*  
“ *months*, resolve itself into a Committee  
“ of the whole House, to consider further  
“ of the bill to disfranchise and incapacitate  
“ certain persons, therein mentioned,  
“ from voting at elections of members to  
“ serve in Parliament, and for preventing  
“ bribery and corruption, in the election  
“ of members to serve in Parliament, for  
“ the borough of Shafton, otherwise Shaftesbury, in the county of Dorset ;

“ It passed in the negative.”

And that day se’nnight was appointed for the Committee to sit again (2).

(1) *Supra*, Suppl. to the Case of Hindon, p. 282.

(2) Votes, p. 664.

On Wednesday, however, the 8th of May, immediately after the proceedings of that day relative to the borough of Hindon (1), the House being moved, that the order of Monday the 5th, appointing that day se'nnight for the House to resolve itself again into a Committee on the incapacitation bill for Shaftesbury, might be read, and it being read;

It was ordered to be *discharged* (2).

It is evident, from the foregoing account of the proceedings on this bill, that it was opposed in the same manner with the Hindon bill. It was thought to be liable to the same objections, and it had the same fate. As soon as the order for proceeding further upon it was discharged, a resolution was come to, as in the case of Hindon, that the Speaker should issue his warrant for a new writ, to supply the vacancy for Shaftesbury (3).

(1) *Supra*, p. 27

(2) *Votes*, p. 693.

(3) *Ibid.*

On Friday, the 22d of November, in the third session of the present Parliament, a petition of Mr. Rumbold being offered to be presented to the House, “ A motion  
 “ was made, and the question being pro-  
 “ posed, that the said petition be brought  
 “ up, and a debate arising in the House  
 “ thereupon; a motion was made, and the  
 “ question being put, that the debate be  
 “ adjourned till Monday, the 3d day of  
 “ February next;

“ It passed in the negative (1).”

Then the petition was brought up and read. It contained the same allegations with his petition, presented on the 28th of February, in the foregoing session (2), and set forth, besides, “ That the peti-  
 “ tioner did make an *application* (3) for re-  
 “ lief, in the last session, which was rejected,  
 “ and that the resolution concerning which  
 “ he offered his said petition having been  
 “ passed in the said session, he apprehended,

(1) Votes, 22 Nov. 1776. p. 98.

(2) *Supra*, p. 351, 352.

(3) This word should be “ *petition*.”

“ that

“ that *that* circumstance might have been  
 “ a motive to the House, not to grant the  
 “ prayer of his said petition. That he  
 “ hoped, therefore, that, this cause no  
 “ longer existing, his request might now  
 “ be more favourably received.”

The entry in the Journal of the House, of the 14th of February in the foregoing session of Parliament, of the proceedings of the House, on taking the minutes of the Committee on the Shaftesbury election into consideration, so far as they related to Mr. Rumbold, and the order for prosecuting him, being then read, the House having been moved for that purpose, the following order was made :

“ Ordered, That the said order to the  
 “ Attorney General, for prosecuting the  
 “ said Thomas Rumbold, Esquire, be dis-  
 “ charged (1).”

Afterwards, a petition of Mr. Sykes, precisely in the same terms with that of

Mr. Rumbold, was presented, and then the entry of the proceedings of the 14th of February, in the foregoing session, so far as they related to him, together with the order for prosecuting him, being read, on a motion for that purpose;

The order for prosecuting him was discharged (1).

Lastly, the entry of the proceedings of the same day, relative to Good, Bennet, Armstrong, Merefield, Pope, and Hannam, together with the order for prosecuting them, being read, on a motion for that purpose;

The order for prosecuting them was also discharged (2).

It is observable, that there were not, in this case, (as there had been in that of Hindon) any orders of the House, directing prosecutions for bribery.

(1) Votes, p. 99, 100.

(2) Votes, p. 100.

While



While the proceedings in the House of Commons were depending, Mr. Mortimer, the petitioner who had been determined to be duly elected, brought an action against Mr. Sykes, on the statute of 2 Geo. II. cap. 24. for twenty-six acts of bribery, charged to have been committed previous to the election, and within the time limited by the statute (1), for suing for the penalties. The cause was tried at the assizes at Dorchester, on the 27th of July, 1776, before Mr. Baron Eyre, and the plaintiff had a verdict for twenty-two penalties, amounting to eleven thousand pounds.

(1) 2 Geo. II. cap. 24. § 7.

N O T E S  
ON THE  
S U P P L E M E N T  
TO THE  
CASE of SHAFTESBURY.

PAGE 345. (A) “ It seems to have been always  
“ agreed, that the plea of the accessory cannot be  
“ tried before the appearance or attainder of the prin-  
“ cipal, unless he desires it himself; in which case, it  
“ is agreed, that he may be tried without the prin-  
“ cipal, according to the rule that, *Quilibet potest*  
“ *renunciare juri pro se introducto.*” Hawk. *loc. cit.*

P. 349. (B) It is worthy of observation, that,  
although such nicety is thought necessary in the  
formal proceedings in prosecutions on this statute,  
there is great inaccuracy in the language of the statute  
itself. One of the most obvious rules, in penning  
acts

acts of Parliament, seems to be, that, in different cases, when the meaning of the legislature is the same, the same form of words, or mode of expression, should be used. Yet it is astonishing how little care is taken to adhere to this rule (*Vide supra*, vol. iii. p. 234, 235). In this statute of Queen Elizabeth, it is enacted, by § 4, That, if it happen any such offender, &c. (i. e. any *suborner* of perjury,) being convicted, &c. not to have any *goods or chattels, lands or tenements*, to the value of 40 pounds, that then, &c. And, by § 7. That if it happen the said offender, (i. e. any person having *committed* perjury) not to have any *goods and chattels* to the value of 20 pounds; that then, &c. The meaning of the legislature, as to the inability of paying the fine, must have been the same in both instances; (and so it is stated by Sir W. Blackstone, vol. iv. p. 137. 4to Ed.) yet, in a conviction for perjury, the having *lands* to the value, does not, by the *words* of the act, exempt the convict from the alternative prescribed in case of such inability. If a person convicted of subornation cannot pay the fine, he is, by § 4, “to stand upon the pillory the space of one whole hour.” If a person convicted of perjury is unable to pay the fine, he is to be set on the pillory, and there to have both his ears nailed. Here again, notwithstanding the difference of expression, we can hardly suppose, that the manner of standing in the pillory was intended to be different in the two cases; and Sir W. Blackstone, in the passage just cited, states the law to be, as well with

with regard to subornation, as to perjury, that the offender is *to stand with both ears nailed to the pillory.*

P. 353. (C) A very few years ago, a case happened, in which an order of the House of Commons was expunged from the Votes by a subsequent order, in the same session, at the distance of less than a month from the time when the first order was made. The occasion was this: Dr. Thomas Nowell, principal of St. Mary Hall, King's professor of modern history, and public orator in the university of Oxford; had preached the annual sermon, on the 30th of January, 1772 (the anniversary of the death of Charles the First), at St. Margaret's, Westminster, before the House of Commons. On the 31st, the following order was made:

Ordered, " That the thanks of this House be given to the Reverend Doctor Nowell, for the sermon preached by him yesterday, before this House, at St. Margaret's, Westminster; and that he be desired to print the same; and that Sir William Dolben, and Mr. Alexander Popham do acquaint him therewith."

It is well known how ill those sermons are generally attended, and how much it has been looked upon as a matter of course that the thanks of the House should be given to the preacher. When the sermon in question, however, came to be printed, it was thought by many people to contain sentiments repugnant to the freedom of the constitution and the

principles of the revolution; in some passages, the author seemed to justify all the arbitrary measures of the Crown in the beginning of the reign of Charles the First, and to condemn, indiscriminately, all the steps taken to resist them; and his sermon concluded with what was considered as an indiscreet comparison between that Prince and his present Majesty. It was feared that, if the vote of thanks for this sermon should continue on the records of the House, it might, to some, carry with it an appearance, as if the House had given their sanction and approbation to the exceptionable sentiments and passages contained in it. To prevent any consequence of this sort, a motion was made, on Tuesday, the 25th of February, that the entry in the Votes, of the order which has been stated, should be read; which being done, the House was moved, That the said entry should be expunged from the Votes.

Before the question was put on this, another motion was made, "That the orders of the day be now read," (by which an attempt was made to put off the question for expunging the vote of thanks) and a third motion being made, "That the Journal of the House, of the 12th day of May, 1660, of the proceedings of the House, in relation to an exception which was taken to some words spoken by Mr. Lenthall, then a member of the House, might be read," the same was read accordingly, and then the question being put on the motion for reading the orders of the day, the House divided, and it passed in the negative, by a majority of 152, to 41.

Then

Then the main question was put, and the following resolution come to :

Resolved, " That the said entry be expunged  
" from the Votes of this House." (Journ. Vol.  
xxxiii. p. 509. col. 2.)

In consequence of this resolution, the order of the  
31st of January is not inserted in the Journal of that  
day in the ordinary form, but, there is a memoran-  
dum reciting it, and mentioning the resolution for  
expunging it. (Journ. same Vol. p. 435. col. 2.  
436. col. 1.)

The entry referred to, of the 12th of May, 1660,  
is as follows :

" Some exception was taken to some words spoken  
" by Mr. Lenthall, a member of this House, in the  
" debate of the bill of general pardon, to the effect  
" following, viz. " He that first drew his sword  
" against the King, committed as high an offence,  
" as he that cut off the King's head."

" Mr. Lenthall, standing up in his place, explained  
" himself; and withdrew.

" The question being propounded, That Mr.  
" Lenthall be called to the bar; and there receive  
" the reprehension of this House;

" And the question being put, That this question  
" be now put;

" It passed with the affirmative.

" And the main question being put; it was

" Resolved, That Mr. Lenthall be called to the  
" bar, and there receive the reprehension of the  
" House.



“ The serjeant, with his mace, went to Mr.  
“ Lenthall, who was withdrawn into the Speaker’s  
“ chamber, and brought him to the bar of this  
“ House; who there kneeling, Mr. Speaker bid him  
“ rise; and after, according to the order of the  
“ House, gave him a sharp reprehension to the effect  
“ following: .

“ Mr. Lenthall, The House hath taken very great  
“ offence at some words you have let fall, upon de-  
“ bate of this business, of the bill of indemnity;  
“ which, in the judgment of this House, hath as  
“ high a reflection on the justice and proceedings of  
“ the Lords and Commons of the last Parliament, in  
“ their actings before 1648, as could be expressed.  
“ They apprehend, there is much of poison in the  
“ words; and that they were spoken out of design to  
“ set this House on fire; they tending to render them  
“ that drew the sword to bring delinquents to con-  
“ dign punishment, and to vindicate their just liber-  
“ ties, into balance with them that cut off the  
“ King’s head; of which act they express their  
“ abhorrence and detestation; appealing to God,  
“ and their conscience bearing them witness, that  
“ they had no thoughts against his person, much less  
“ against his life. Therefore, I am commanded to  
“ let you know, that, had these words fallen out at  
“ any other time, but in this Parliament; or, at any  
“ time in this Parliament, but when they had consi-  
“ derations of mercy, pardon, and indemnity, you  
“ might have expected a sharper and severer sentence  
“ then I am now to pronounce: But the disposition  
“ of

“ of his Majesty is to mercy ; he hath invited his  
“ people to accept it ; and it is the disposition of the  
“ body of this House, to be healers of breaches, and  
“ to hold forth mercy to men of all conditions, so  
“ far as may stand with justice, and the justification  
“ of themselves before God and man : I am therefore  
“ commanded to let you know, that *that* being their  
“ disposition, and the present subject of this day’s  
“ debate being mercy, you shall therefore taste of  
“ mercy ; yet I am to give you a sharp reprehension ;  
“ and I do, as sharply and severely as I can, (for so  
“ I am commanded) reprehend you for it.”

The first part of the paper is devoted to a general discussion of the problem. It is shown that the problem is equivalent to the problem of finding a function  $f(x)$  which satisfies the conditions

$$f(x) = \int_0^x f(t) dt + \int_0^x f(t) dt + \int_0^x f(t) dt + \dots$$

and

$$f(x) = \int_0^x f(t) dt + \int_0^x f(t) dt + \int_0^x f(t) dt + \dots$$

It is then shown that the function  $f(x)$  is unique and that it is given by the formula

$$f(x) = \int_0^x f(t) dt + \int_0^x f(t) dt + \int_0^x f(t) dt + \dots$$

The second part of the paper is devoted to a detailed study of the function  $f(x)$ . It is shown that the function  $f(x)$  is continuous and that it is differentiable at every point  $x$  for which  $f(x) \neq 0$ . It is also shown that the function  $f(x)$  is not differentiable at the point  $x = 0$ .

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## A P P E N D I X.

THE third section of the Introduction contains the *substance* of the statutes, which established the new judicature, digested in a regular method: But questions have often arisen in Committees, and others may, in future, arise, on the construction of the *words* of those statutes. It has, on that account, been thought proper, by way of Appendix, to insert the statutes themselves in this place, where they will be more accessible, and more easily consulted, than in the voluminous editions of the Statutes at Large.

## Statute 10 GEORGE III. Cap. 16.

*An Act to regulate the Trials of controverted Elections, or Returns, of Members to serve in Parliament.*

I. **W**HEREAS the present mode of decision upon petitions, complaining of undue elections or returns of members to serve in Parliament, frequently obstructs public business; occasions much expence, trouble, and delay to the parties; is defective, for want of those sanctions and solemnities which are established by law in other trials; and is attended with many other inconveniences: For remedy thereof, be it enacted by the King's most excellent Majesty, by and with the consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that after the end of the present session of Parliament, whenever a petition, complaining  
of

of an undue election or return of a member or members to serve in Parliament, shall be presented to the House of Commons, a day and hour shall, by the said House, be appointed for taking the same into consideration; and notice thereof in writing shall be forthwith given, by the Speaker, to the petitioners and the sitting members, or their respective agents, accompanied with an order to them to attend the House, at the time appointed, by themselves, their counsel, or agents.

2. Provided always, That no such petition shall be taken into consideration within fourteen days after the appointment of the Committee of Privileges.

3. Provided also, That the House may alter the day and hour so appointed for taking such petition into consideration, and appoint some subsequent day and hour for the same, as occasion shall require; giving to the respective parties the like notice of such alteration, and order to attend on the said subsequent day and hour, as aforesaid.

4. And



## A P P E N D I X.

4. And be it further enacted, That at the time appointed for taking such petition into consideration, and previous to the reading the order of the day for that purpose, the serjeant at arms shall be directed to go with the mace to the places adjacent, and require the immediate attendance of the members on the business of the House; and that after his return the House shall be counted, and if there be less than one hundred members present, the order for taking such petition into consideration shall be immediately adjourned to a particular hour on the following day (Sunday and Christmas day always excepted); and the House shall then adjourn to the said day; and the proceedings of all Committees, subsequent to such notice from the said serjeant, shall be void: And, on the said following day, the House shall proceed in the same manner; and so, from day to day, till there be an attendance of one hundred members at the reading the order of the day, to take such petition into consideration.

\*

5. And

5. And be it further enacted, That if after summoning the members, and counting the House as aforesaid, one hundred members shall be found to be present; the petitioners by themselves, their counsel or agents, and the counsel or agents of the sitting members, shall be ordered to attend at the bar; and then the door of the House shall be locked, and no member shall be suffered to enter into or depart from the House, until the petitioners, their counsel, or agents, and the counsel or agents for the sitting members, shall be directed to withdraw as herein after is mentioned: And when the door shall be locked as aforesaid, the order of the day shall be read, and the names of all the members of the House, written or printed on distinct pieces of parchment or paper, being all as near as may be of equal size, and rolled up in the same manner, shall be put in equal numbers into six boxes or glasses, to be placed on the table for that purpose, and shall there be shaken together; and then the  
clerk

clerk or clerk assistant attending the House shall publickly draw out of the said six boxes or classes alternately the said pieces of parchment or paper, and deliver the same to the Speaker, to be by him read to the House; and so shall continue to do, until forty-nine names of the members then present be drawn.

6. Provided always, That if the name of any member who shall have given his vote at the election so complained of as aforesaid, or who shall be a petitioner complaining of an undue election or return, or against whose return a petition shall be then depending, or whose return shall not have been brought in fourteen days, shall be drawn; his name shall be set aside, with the names of those who are absent from the House.

7. Provided also, That if the name of any member of sixty years of age or upwards be drawn, he shall be excused from serving on these select Committee, to be appointed as herein after is mentioned, if he  
require

require it, and verify the cause of such requisition upon oath.

8. Provided also, That if the name of any member who has served in such select Committee during the same session be drawn, he shall, if he requires it, be excused from serving again in any such select Committee, unless the House shall, before the day appointed for taking the said petition into consideration, have resolved, that the number of members who have not served on such select Committee, in the same session, is insufficient to fulfil the purposes of this act, respecting the choice of such select Committee.

9. Provided always, That no member who, after having been appointed to serve in any such select Committee, shall, on account of inability or accident, have been excused from attending the same throughout, shall be deemed to have served on any such select Committee.

10. And be it further enacted, That if  
1 upon

upon oath any other excuse, the substance of the allegations so verified upon oath shall be taken down by the said clerk, in order that the same may be afterwards entered on the Journals, and the opinion of the House shall be taken thereon; and if the House shall resolve, that the said member is unable to serve, or cannot without great and manifest detriment serve in such select Committee, he also shall be excused from such service.

II. And be it further enacted, That instead of the members so set aside and excused, the names of other members shall be drawn; who may, in like manner, be set aside or excused, and others drawn to supply their places, until the whole number of forty-nine members, not liable to be so set aside or excused, shall be complete; and the petitioners or their agents shall then name one, and the sitting members, or their agents, another, from among the members then present, whose names shall not have been drawn, to be added  
to

to those who shall have been so chosen by lot.

12. Provided always, That either of the members so nominated shall or may be set aside, for any of the same causes as those chosen by lot; or shall, if he requires it, be excused from serving on the said select Committee; and the party who nominated the member so set aside, or excused, shall nominate another in his stead, and so continue to do as often as the case shall happen, until his nominee is admitted.

13. And be it further enacted, That as soon as the said forty-nine members shall have been so chosen by lot, and the two members to be added thereunto shall have been so nominated as aforesaid, the door of the House shall be opened, and the House may proceed upon any other business; and lists of the forty-nine members so chosen by lot shall then be given to the petitioners, their counsel or agents, and the counsel or agents for the sitting members, who shall immediately withdraw,  
together



together with the clerk appointed to attend the said select Committee; and the said petitioners and sitting members, their counsel or agents, beginning on the part of the petitioners, shall alternately strike off one of the said forty-nine members, until the said number shall be reduced to thirteen; and the said clerk, within one hour at farthest from the time of the parties withdrawing from the House, shall deliver in to the House the names of the thirteen members then remaining; and the said thirteen members, together with the two members nominated as aforesaid, shall be sworn at the table, well and truly to try the matter of the petition referred to them, and a true judgment to give according to the evidence; and shall be a select Committee to try and determine the merits of the return or election appointed by the House to be that day taken into consideration; and the House shall order the said select Committee to meet at a certain time to be fixed by the House, which

which time shall be within twenty-four hours of the appointment of the said select Committee, unless a Sunday or Christmas day shall intervene ; and the place of their meeting and sitting shall be some convenient room or place adjacent to the House of Commons or Court of Requests, properly prepared for that purpose.

14. Provided always, That on the parties withdrawing as aforesaid, the House shall continue sitting ; and the said fifty-one members, so chosen and nominated, shall not depart the House, till the time for the meeting of the said select Committee shall be fixed.

15. Provided always, and be it further enacted, That if upon the drawing out the name of any member by lot as aforesaid, the said petitioners or sitting members, or their agents, shall declare, that such member is intended to be one of the two nominees to be nominated by them respectively ; and if such member shall consent to such nomination, the name of such member so drawn

by lot shall be set aside ; and, unless objected to as aforesaid, he shall serve as such nominee, and the name of another member shall be drawn to supply his place, to complete the number of forty-nine members to be drawn by lot ; and if the said petitioners or sitting members, or their agents, shall not respectively nominate a member then present, who shall be admitted according to the directions of this act, then the want of such nomination shall be supplied, by drawing out, instead thereof, the name of one or two members, as the case shall require ; who shall be drawn by lot in the like manner, and subject to the like objections and excuses, as the other forty-nine members already drawn by lot, and shall be added to the lists of the said forty-nine members, and shall be liable to be struck off in the same manner ; leaving always the number of fifteen members in the whole, and no more, as a select Committee for the purposes aforesaid.

16. And, for the greater dispatch and certainty in the proceeding herein before described, be it further enacted, That the names of all the members so written and rolled up as herein before directed, shall, previous to the day appointed for taking any such petition into consideration, be prepared by the said clerk or clerk assistant, and by him put into a box or parcel in the presence of the Speaker, together with an attestation, signed by the said clerk or clerk assistant, purporting, that the names of all the members were by him put therein the day of

in the year                      which said box or parcel the Speaker shall seal with his own seal; and to the outside thereof shall annex an attestation signed by himself, purporting, that the said box or parcel was on the day of

in the year                      made up in his presence, in the manner directed by this act; and that as soon as the parties shall be withdrawn as aforesaid, and before the

House shall enter on any other business, any member may require, that the names of all the members, which remain undrawn, shall be drawn and read aloud by the said clerk or clerk assistant.

17. And be it further enacted, That the said select Committee shall, on their meeting, elect a Chairman from among such of the members thereof as shall have been chosen by lot; and if, in the election of a Chairman, there be an equal number of voices, the member whose name was first drawn in the House shall have a casting voice; so likewise, in case there should ever be occasion for electing a new Chairman, on the death or necessary absence of the Chairman first elected.

18. And be it further enacted, That the said select Committee shall have power to send for persons, papers and records; and shall examine all the witnesses who come before them upon oath; and shall try the merits of the return, or election, or both; and shall determine, by a majority of voices,  
of

of the said select Committee, whether the petitioners or the sitting members, or either of them, be duly returned or elected, or whether the election be void; which determination shall be final between the parties to all intents and purposes: and the House, on being informed thereof by the Chairman of the said select Committee, shall order the same to be entered in their Journals, and give the necessary directions for confirming or altering the return, or for the issuing a new writ for a new election, or for carrying the said determination into execution, as the case may require,

19. And be it further enacted, That the said select Committee shall sit every day (Sunday and Christmas day only excepted) and shall never adjourn for a longer time than twenty-four hours, unless a Sunday or Christmas day intervene, without leave first obtained from the House, upon motion, and special cause assigned for a longer adjournment; and in case the House shall be sitting at the time to which the said



select Committee is adjourned, then the business of the House shall be stayed, and a motion shall be made for a further adjournment, for any time, to be fixed by the House, not exceeding twenty-four hours, unless a Sunday or Christmas day intervene.

20. And be it further enacted, That where the time prescribed by this act for the meeting, sitting, or adjournment of the said select Committee, shall, by the intervention of a Sunday or Christmas day, exceed twenty-four hours, such meeting, sitting, or adjournment, shall be within twenty-four hours from the time of appointing or fixing the same, exclusive of such Sunday or Christmas day.

21. And be it further enacted, That no member of the said select Committee shall be allowed to absent himself from the same, without leave obtained from the House, or an excuse allowed by the House at the next sitting thereof, on special cause shewn and verified upon oath; and the said select Committee shall never sit,  
until

until all the members to whom such leave has not been granted, nor excuse allowed, are met; and in case they shall not all meet within one hour after the time to which the said select Committee shall have been adjourned, a farther adjournment shall be made in the manner as before directed, and reported, with the cause thereof, to the House.

22. And be it further enacted, That the Chairman of the said select Committee shall, at the next meeting of the House, always report the name of every member thereof who shall have been absent therefrom without such leave or excuse as aforesaid; and such member shall be directed to attend the House at the next sitting thereof, and shall then be ordered to be taken into the custody of the serjeant at arms attending the House, for such neglect of his duty, and otherwise punished or censured at the discretion of the House; unless it shall appear to the House, by facts specially stated and veri-

fied upon oath, that such member was, by a sudden accident, or by necessity, prevented from attending the said select Committee.

23. And be it further enacted, that if more than two members of the said select Committee shall on any account be absent therefrom, the said select Committee shall adjourn in the manner herein before directed; and so from time to time, until thirteen members are assembled.

24. And be it further enacted, That in case the number of members able to attend the said select Committee shall, by death or otherwise, be unavoidably reduced to less than thirteen, and shall so continue for the space of three sitting days, the said select Committee shall be dissolved, and another chosen to try and determine the matter of such petition in manner aforesaid; and all the proceedings of the said former select Committee shall be void and of no effect.

\*

25. And

25. And be it further enacted, That if the said select Committee shall come to any resolution other than the determination above mentioned, they shall, if they think proper, report the same to the House for their opinion, at the same time that the Chairman of the said select Committee shall inform the House of such determination; and the House may confirm or disagree with such resolution, and make such orders thereon, as to them shall seem proper.

26. Provided always, That if any person summoned by the said select Committee, shall disobey such summons; or if any witness before such select Committee shall prevaricate, or shall otherwise misbehave in giving, or refusing to give evidence; the Chairman of the said select Committee, by their direction, may at any time, during the course of their proceedings, report the same to the House, for the interposition of their authority or censure, as the case shall require.

27. And

27. And be it further enacted, That whenever the said select Committee shall think it necessary to deliberate amongst themselves, upon any question which shall arise in the course of the trial, or upon the determination thereof, or upon any resolution concerning the matter of the petition referred to them as aforesaid; as soon as the said select Committee shall have heard the evidence and counsel on both sides relative thereunto; the room or place where they shall sit shall be cleared, if they shall think proper, while the members of the said select Committee consider thereof; and all such questions, as well as such determination and all other resolutions, shall be by a majority of voices; and if the voices shall be equal, the Chairman shall have a casting voice.

28. Provided always, That no such determination as aforesaid shall be made, nor any question be proposed, unless thirteen members shall be present; and no member shall have a vote on such determination, or  
any

any other question or resolution, who has not attended during every sitting of the said select Committee.

29. And be it further enacted, That the oaths by this act directed to be taken in the House, shall be administered by the said clerk or clerk assistant, in the same manner as the oaths of allegiance and supremacy are administered in the House of Commons; and that the oaths by this act directed to be taken before the said select Committee, shall be administered by the clerk attending the said select Committee; and that all persons who shall be guilty of wilful and corrupt perjury in any evidence which they shall give before the House, or the said select Committee, in consequence of the oath which they shall have taken by the direction of this act, shall, on conviction thereof, incur and suffer the like pains and penalties to which any other person, convicted of wilful and corrupt perjury, is liable by the laws and statutes of this realm.

30. And



30. And be it further enacted, That this Act shall continue in force seven years, and till the end of the session of Parliament next after the expiration of the said seven years, and no longer.

Statute II GEORGE III. Cap. 42.

*An Act to explain and amend an Act, made in the last Session of Parliament, intituled, An Act to regulate the Trials of controverted Elections, or Returns, of Members to serve in Parliament.*

I. **W**HEREAS an act was passed in the last session of Parliament, intituled, An act to regulate the trials of controverted elections, or returns of members to serve in Parliament: And whereas further provisions may be necessary to prevent all obstructions and difficulties, which in certain cases may arise in the execution of the said act; be it therefore enacted by the King's most excellent Majesty, by and with

with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the passing of this act, if several parties, on distinct interests or grounds of complaint, shall present separate petitions, complaining of an undue election, or return of a member or members to serve in Parliament, the same notices and orders shall be given to all such parties, or their respective agents, as by the said act are directed to be given to the sitting members, or the petitioners therein mentioned, or their respective agents.

2. And be it further enacted, That the clause in the said act which provides, that no petition shall be taken into consideration within fourteen days after the appointment of the Committee of privileges, be repealed; and that from henceforth no petition, complaining of an undue election, or return of a member or members to serve in Parliament, shall be taken into consideration

ation within fourteen days after the commencement of the session of Parliament in which it is presented, nor within fourteen days after the return to which it relates, shall be brought into the office of the clerk of the Crown.

3. And be it further enacted, That if at the time of drawing by lot the names of the members, in manner prescribed by the said act, the number of forty-nine members, not set aside nor excused, cannot be compleated, the House shall proceed in the manner they are directed by the said act to proceed, in case there be less than one hundred members present at the time therein prescribed for counting the House; and so, from day to day, as often as the case shall happen.

4. And be it further enacted, That on the day appointed for taking any petition, complaining of an undue election, or return of a member or members to serve in Parliament, into consideration, the House shall not proceed to any other business  
what-

whatsoever, except the swearing of members, previous to the reading of the order of the day for that purpose.

5. And be it further enacted, That if the select Committee shall have occasion to apply or report to the House, in relation to adjournment of the said select Committee, the absence of the members thereof, or the non-attendance or misbehaviour of witnesses summoned to appear, or appearing before them, and the House shall be then adjourned for more than three days, the said select Committee may also adjourn to the day appointed for the meeting of the House.

6. And be it further enacted, That if on a complaint by petition of an undue election or return, there shall be more than two parties before the House, on distinct interest, or complaining or complained of upon different grounds, whose right to be elected or returned may be affected by the determination of the said select Committee, each of the said parties shall successively  
strike

strike off a member from the forty-nine members to be chosen by lot, until the said number be reduced to thirteen, in the same manner as by the said act is directed for the striking off a member alternately by the parties therein mentioned; and the lists of the forty-nine members chosen by lot shall, for this purpose, be given to all the said parties, and the order in which the said parties shall so strike off the said members shall be determined by lot after they are withdrawn from the bar, and in such case, neither of the said parties (there being more than two) shall be permitted to name a member to be added to the members so drawn by lot as aforesaid; but that as soon as the list of thirteen members shall be returned by the parties to the House, such thirteen members shall immediately withdraw, and shall by themselves chuse two members then present in the House, whose names shall not have been drawn, to be added to the said thirteen members; and shall, within one hour from the time  
of

of their withdrawing, report the names of such two members to the House; which two members shall be liable to be set aside on the like objections, for which nominees may be set aside by virtue of the said act: And in case such two members, or either of them, shall be set aside for any of the causes aforesaid, then the said thirteen members shall chuse one or two other members, as the case shall require, until two members are chosen, against whom none of the objections to nominees mentioned in the said act shall be taken and allowed; and that the names of such two members shall be then added to the said list of thirteen members; and all the said fifteen members shall be sworn at the table, and they shall be the select Committee appointed for the purposes expressed in this and the said former act.

7. And be it further enacted, That where the said nominees are by this act directed to be named by the said thirteen members, no member present at the time



of the ballot shall depart from the House until the time for the meeting of the said select Committee shall be fixed.

Statute 14 GEORGE III. Cap. 15.

*An Act for making perpetual Two Acts, passed in the Tenth and Eleventh Years of the Reign of His present Majesty, for regulating the Trials of controverted Elections, or Returns, of Members to serve in Parliament.*

1. **WHEREAS** an act passed in the tenth year of the reign of his present Majesty, intituled, An act to regulate the Trials of controverted Elections, or Returns of Members to serve in Parliament, which act was made to continue for a limited time only: And whereas another act passed in the eleventh year of the reign of his said Majesty, intituled, An act to explain and amend an act, made in the

last session of Parliament, intituled, An act to regulate the Trials of controverted Elections, or Returns of Members to serve in Parliament: And whereas the provisions of the said recited acts are well adapted to procure to the Commons of this realm a free and impartial trial of controverted elections of members to serve in Parliament, and have been found, by experience, to be practicable and beneficial: May it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the said recited acts, passed in the tenth and eleventh years of his present Majesty, shall be, and are hereby made, perpetual.



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